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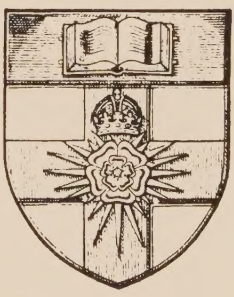

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

STAPLEY *v.* READ BROTHERS, LIMITED.

RUSSELL J.

1924

March 7, 12, 17.

[1924. S. 850.]

Company—Accounts—Debit to Profit and Loss Account—Right to divide Profits subsequently earned—Writing off Goodwill out of Profits—Capitalization of Profits—Restoring Goodwill as an Asset in Balance Sheet.

A company which applies its profits in writing off a corresponding amount of the value of the goodwill, instead of carrying them to a goodwill depreciation reserve fund, but which has not finally and unreservedly capitalized those profits, may write back to profit account so much of the depreciation written off goodwill as proves to be in excess of proper requirements.

MOTION (treated as trial of the action).

Up to and including 1906 the balance sheets of the company contained an item of 140,000*l.* for goodwill. In 1906 10,000*l.* was written off the goodwill out of profits. That process was continued from time to time until, in 1917, the goodwill had been written down to 51,000*l.* Meanwhile a reserve fund of 50,000*l.* had been built up out of profits, and, out of the 1917 profits, 11,000*l.* was added. The goodwill account was then eliminated from the

RUSSELL J. 1924 STAPLEY v. READ BROS., LD.

balance sheet for 1918 by writing it off against the reserve account, that is, the goodwill disappeared from the assets side and the reserve fund was reduced to 10,000*l.* In 1920 the reserve fund amounted to 25,000*l.*, and the balance of profits brought forward from the previous year to 33,000*l.* The company capitalized the reserve fund and 15,000*l.* of the balance of profits by issuing 40,000 bonus ordinary shares of 1*l.* each. In 1921 and 1922 the company made a net loss, and the debit balance to profit and loss account at December 31, 1922, amounted to 20,504*l.* 16*s.* 6*d.* In 1923 the company made a net profit of 13,430*l.* 8*s.* 8*d.* The preference dividends for 1921, 1922 and 1923 were unpaid, and the directors in their report for 1923, after pointing out that 180,000*l.*, which might have been divided, had been retained in the business by writing off the amount, 140,000*l.*, at which the goodwill originally stood in the balance sheet, and by the issue of 40,000 1*l.* bonus shares, recommended that the three years' dividend accrued on the preference shares to December 31, 1923, should be paid out of the current year's profits, and that the debit balance to profit and loss account as at December 31, 1922, should be carried to a suspense account and written off against a reserve of 40,000*l.* created by writing back to reserve 40,000*l.* of the profits applied in the past in writing off goodwill. The report continued: "The directors are satisfied that, having regard to the company's past history as a whole, 40,000*l.* is a conservative value to place upon the goodwill, and that the course which they recommend is financially sound and in the interests of the company, the profits earned during the calendar year not being required in the business, whilst the existence of arrears of dividend on the preference shares is detrimental to the company's general credit and financial standing. The alternative would be to apply the calendar year's profits towards reducing the debit balance to profit and loss account as at December 31, 1922, and carry forward the balance of such debit, which would mean postponing the resumption of payment of dividends until a future date." The balance sheet was certified by the company's auditors.

Doubts being raised as to the legality of this procedure the present action was commenced. The plaintiff now asked for an injunction to restrain the defendants from treating as profits available for dividend any profits originally applied in writing off or down the book value of the company's assets, and afterwards written back on the ground that such assets stand in the company's books at less than their true value.

Courthope Wilson K.C. and *Dighton Pollock* for the plaintiff. Goodwill has been eliminated by writing it off against reserve, and by so doing the undivided profits have been turned into capital. Having once changed their character the profits cannot be written back again as profits. If the profits had been carried to a suspense or reserve account they would have remained profits, but if the company apply them in wiping out a capital loss they then become capital and the action of the company is irrevocable: *In re Bridgewater Navigation Co.* (1) Here the goodwill which once appeared as an asset in the balance sheet is treated in the balance sheet for 1918 as being of no value. It is now proposed to write back 40,000*l.* for goodwill. An unrealized accretion to the estimated value of one item of the capital assets cannot be treated as divisible profit without reference to the result of the whole accounts fairly taken. This sum of 40,000*l.* is not a realized profit: *Foster* v. *New Trinidad Lake Asphalte Co.* (2); *Cross* v. *Imperial Continental Gas Association.* (3)

Bennett K.C. and *Gordon Brown* for the defendants. It is submitted that the 40,000*l.* is a hidden reserve. If the company had created a goodwill depreciation reserve fund to which they had carried the profits they could have distributed them at any time. Instead of adopting such a system of book-keeping they adopted another, which has resulted in what is really a reserve fund being concealed. There is no provision in the Companies Acts nor any rule

(1) [1891] 2 Ch. 317, 327. (2) [1901] 1 Ch. 208.
(3) [1923] 2 Ch. 553.

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of commercial practice which prevents a company which has adopted one particular system of book-keeping from adopting another. It is in each case a question whether the change is made bona fide. The company has done no act which shows the intention of permanently converting the profits into capital. When the company intended to capitalize its profits it did so in the appropriate way by applying such profits in paying up in full and distributing among its shareholders bonus shares. All that the company now proposes to do is to state in its balance sheet the real value of an asset it possesses. It is admitted that the real value now of the goodwill is at least 40,000*l*. In *Ammonia Soda Co.* v. *Chamberlain* (1) an asset which had been written down was written up, and here we propose to do the same thing. We are now writing back what was before written off and, since the amount written off was treated as a deduction from profits in former accounts, there is no reason why the amount that is now written back should not be treated as profits in the same way : *Bishop* v. *Smyrna and Cassaba Ry. Co.* (2)

Cur. adv. vult.

March 17. RUSSELL J. Goodwill had since 1918 been eliminated from the balance sheet by writing it off against the reserve fund, that is to say, goodwill disappeared from the assets side and on the liability side the reserve fund was proportionally reduced. The company still owned the asset, whatever its true value might be, but, for the purpose of its accounts, treated that asset as of no value.

The point raised in the notice of motion is not covered by direct authority. If the company had kept their accounts in a different form, no difficulty would have arisen. If they had retained goodwill as an asset in their balance sheet, and if, instead of writing off its value out of profits, they had carried those profits to a goodwill depreciation reserve fund, they would have been at liberty at any time to distribute those profits, at all events to the extent by

(1) [1918] 1 Ch. 266. (2) [1895] 2 Ch. 596.

which the amount of such a reserve fund exceeded the amount of the actual depreciation. Thus, if, as is admitted, the honest value of the goodwill at the present time is at least 40,000*l.*, and there was 140,000*l.* to the credit of such reserve, they could have distributed 40,000*l.* of the reserve fund as profits. Does it make any difference that they have kept their accounts in another form, and that instead of placing the profits to a reserve account, they have purported to apply them in writing off a corresponding amount of the value of the goodwill? The answer seems to me to depend upon the further question, have the company finally and irrevocably capitalized those profits so as to disentitle themselves for ever afterwards from restoring them to reserve and from dealing with them as profits? No doubt the accounts showing the particular methods adopted were approved every year by the shareholders in general meeting, but I am not satisfied that the shareholders thereby intended, or bound themselves, for all time and in all circumstances to give up their claims to these profits and to treat them as capital only.

In my opinion, unless there is anything in the Companies (Consolidation) Act, 1908, or in the constitution of the company to prohibit it, the shareholders may, if they think fit, write back to profit account so much of the depreciation written off goodwill as has proved to have been in excess of proper requirements. This is shown in the present case to be a sum of not less than 40,000*l.* There is no provision that I am aware of, either in the Companies (Consolidation) Act, 1908, or in the company's constitution which prevents this being done, nor is there any prejudice to creditors.

I am unable to grant the injunction asked for.

Solicitors: *Taylor & Humbert; Dawson & Co.*

J. B. B. M.

ROMER J.

1923

Oct. 18, 19; *Dec.* 21.

In re VISCOUNT PORTMAN.

PORTMAN *v.* VISCOUNT PORTMAN.

[1923. P. 1207.]

Inland Revenue—Estate Duty—Settlement—Perpetual yearly Rentcharge—Payable without any Deduction except for Death Duties—Liability to temporary Abatement—Assessment of Duty—Limited Owner—Method of ascertaining Proportion of Estate Duty—Income Tax—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7; *s.* 8, *sub-s.* 4; *s.* 9, *sub-s.* 1; *s.* 14, *sub-s.* 1.

A rentcharge of 50,000*l.* per annum charged on London settled estates was limited to the use of the defendant, the fourth Viscount Portman, for life with remainder to the use of his eldest son during his life, to commence from their respective successions to the title and to be paid without any deduction except for death duties, and a similar rentcharge was limited in remainder (in the event of any other issue of the fourth Viscount succeeding to the title) to the use of the sons of such eldest son and other sons of the fourth Viscount in tail male. Subject to such rentcharge, the London settled estates were limited to the use of the plaintiff for life with remainder to the use of his eldest son for life with remainders over.

The third Viscount, who was tenant for life of the estates in question, had died in 1923, while nine of the yearly instalments of estate duty payable in respect of the death of the second Viscount, who had died in 1919, remained unpaid. It was not disputed that the rentcharge limited to the fourth Viscount must bear some proportion of the estate duty assessable upon the death of the third Viscount, and that in principle the same proportion would apply to the estate duty remaining unpaid in respect of the death of the second Viscount.

The London estates comprised a large number of freehold reversions, some of which would in future be constantly falling into possession on the determination of existing building leases, and the capital value of the estates was much greater than a sum represented by twenty-four or twenty-five years' purchase. Upon an application for determining how the perpetual yearly rentcharge should be valued for the purpose of bearing its due proportion of estate duty:—

Held, that while the 50,000*l.* rentcharge was payable, the owner should be treated, for the purpose of apportioning estate duty, as the tenant for life of a capital sum charged on the estate equal to the capitalized value, as at the death of the third Viscount, of a perpetual or adequately secured rentcharge of 50,000*l.*, which capital sum would be treated as chargeable with estate duty at the rate charged upon the death of the third Viscount, and that the fourth Viscount as the owner of the rentcharge would, so long as it was payable, have to pay interest in respect of such estate duty at the rate ascertained as in *In re Parker-Jervis* [1898] 2 Ch. 643.

The settlement also provided that if in any year the net rents, profits and income for that year after payment of all rent, rates, taxes and other family charges and the interest on all capital charges, but excluding the 50,000*l.* rentcharge, should be less than 100,000*l.*, then the 50,000*l.* rentcharge payable for that year should abate and be reduced to a sum equal to one-half of such net rents, profits and income.

Held, that the abated rentcharge remained liable to both estate duty interest and income tax, and that in every year in which the abated rentcharge became payable, the capitalized value of a perpetual and adequately secured rentcharge of the abated amount must be ascertained as at the death of the third Viscount, and that such capitalized sum must be treated as charged with estate duty at the rate above mentioned.

In re Parker-Jervis [1898] 2 Ch. 643 distinguished and in part applied.

ADJOURNED SUMMONS.

The second Viscount Portman died on October 16, 1919. Immediately before his death all the Portman settled estates stood limited under various settlements and in the events which had happened in manner following: Under a settlement of 1870, to the use of the second Viscount for life with remainder to the use of the third Viscount for life with remainders (which subsequently failed) to his first and other sons successively in tail male, with remainder (under a settlement of 1911) if the defendant the fourth Viscount should (as happened) succeed to the title, to the uses following—namely, as to the settled estates in the counties of Dorset, Somerset and Devon to the use of the fourth Viscount for life with remainder (as to the said settled estates other than those in the county of Dorset) to the use of his eldest son for life, if he should succeed to the title, with remainders over (in the event of any other son of the fourth Viscount succeeding to the title) to certain uses in favour of his sons and the other sons of the fourth Viscount in tail male; and as to the settled estates in London to the use that the fourth Viscount and his assigns during his life, and after his death to the use that his eldest son during his life on succeeding to the title, should each receive thereout a yearly rentcharge of 50,000*l.*, to commence from their respective successions to the title and to be paid without any deduction except for death duties by equal quarterly payments; and a similar

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rentcharge was limited in remainder (in the event of any other issue of the fourth Viscount succeeding to the title) to the sons of such eldest son and the other sons of the fourth Viscount in tail male. Subject to the limitations aforesaid and, as to the estates charged with the 50,000*l.* rentcharges, subject thereto, all the Portman settled estates were by the settlement of 1911 limited to the use of the plaintiff for life with remainder to the use of his eldest son for life with remainder to the use of his first and other sons successively in tail male with remainders over.

By a deed poll dated October 15, 1913, the second and third Viscounts Portman, in exercise of powers of revocation and new appointment expressly reserved and extended by the 1911 settlement, appointed and declared that if in any year for which either of the rentcharges of 50,000*l.* should be payable the net rents, profits and income for that year arising from the London estates after payment of all rent, rates, taxes and other outgoings including jointures and other family charges and the interest on all capital charges and incumbrances not created as thereinafter mentioned, but excluding the said rentcharge and any incumbrances created for his own exclusive benefit by the person for the time being entitled to the balance of such rents, profits and income, should be less than the sum of 100,000*l.* then the said rentcharge of 50,000*l.* payable for that year should abate and be reduced for that year to a sum equal to one-half of such net rents, profits and income, and so for every such year in which the same event should occur.

The second Viscount Portman died on October 16, 1919. Upon his death estate duty became payable in respect of the London estates by sixteen half-yearly instalments, only seven of which had been paid before the death of the third Viscount Portman, who died on January 18, 1923, without ever having had male issue, and was thereupon succeeded in the title by his brother the defendant Claud Berkeley, fourth Viscount Portman. The balance under the nine instalments then due amounted to about 1,300,000*l.*

Further estate duty became payable on the death of the

third Viscount, but the amount of the claim for such duty had not yet been fixed.

This was a summons for the determination (inter alia) of the question, What proportion of (*a*) the balance remaining unpaid at the death of the third Viscount of the estate duty which became assessable upon the death of the second Viscount in respect of the London estates, and (*b*) the estate duty which became assessable upon the death of the third Viscount in respect of the London estates, should be borne by the yearly rentcharge of 50,000*l.* appointed by the settlement of 1911 to the fourth Viscount during his life, as subject to abatement under the deed poll of October 15, 1913, and in what manner he ought to contribute to such duty and the interest thereon.

A further question whether income tax could properly be deducted from the payments of the abated rentcharge was also raised for determination.

It appeared that the London estates comprised a large number of freehold reversions, some of which would in future be constantly falling into possession on the determination of existing building leases, and that the capital value of the estates was much greater than a sum represented by twenty-four or twenty-five years' purchase.

Maugham K.C. and *McMullan* for the plaintiff. The deeds poll of 1911 and 1913 must be read together, and the abated rentcharge is only substituted for the full rentcharge of 50,000*l.*, and is liable to the same deductions for estate duty interest and income tax. Under the settlement of 1911 the 50,000*l.* rentcharge is expressly made subject to deduction for death duties, and the apportionment of liability for estate duty between the different interested parties must be made according to the method adopted in *In re Parker-Jervis.* (1)

Under the deed poll of 1913 the net rent is the net rent after deducting the interest on estate duty now existing, and then if the net rent is less than 100,000*l.* the deed would not operate except in reducing the 50,000*l.* rentcharge subject

(1) [1898] 2 Ch. 643.

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always to the interest on estate duty properly chargeable against it. The purpose of the deed was to operate in the direction of reducing the rentcharge, not by way of increasing it, as might be the case if it were decided that the effect of the provision was to relieve it of its proportion of duty. In the case of the abated rentcharge it is a question whether the principle of *In re Parker-Jervis* (1) should not be modified.

It is agreed that the same principle which applied on the death of the third Viscount would also apply to the unpaid instalments of duty in respect of the death of the second Viscount.

Income tax must be borne by the present Viscount; the rentcharge is not in any case given free from income tax. The deed poll of 1913 merely fixes the gross amount of the rentcharge.

Hughes K.C. and *Method* for the defendant infant sons of the plaintiff. The method adopted in *In re Parker-Jervis* (1) applies to a fixed jointure, but the difficulty in this case arises from this being a rentcharge, not fixed, but liable to abatement from time to time. When the net income falls below 100,000*l.* for any year, then the person entitled to the rentcharge and the tenant for life of the property subject to the rentcharge are really tenants in common, and they ought to bear the interest on the estate duty equally. We support the view taken on behalf of the plaintiff.

Upjohn K.C. and *Whinney* for the defendant Viscount Portman. The words of the deed poll of 1913 are plain. By that deed the appointors meant to produce the result that while the Viscount should always receive a rentcharge of 50,000*l.* per annum whatever the net income of the London estates should be, so long as it exceeded 100,000*l.*, they intended to prevent the owner of the rentcharge from deriving a larger income from those estates than the person entitled to the income therefrom subject to the charge. They were not thinking about estate duty. Sect. 8, sub-s. 4, of the Finance Act, 1894, makes the owner of a rentcharge accountable, and under s. 9, sub-s. 1, the duty is a charge on the property.

(1) [1898] 2 Ch. 643.

Sect. 14 is only machinery, and the result of all the sections is that the duty falls upon the beneficiaries according to their respective interests; each bearing his proportionate part: *In re Countess of Orford* (1); *Berry* v. *Gaukroger* (2); *In re Palmer*. (3) The decision in *In re Parker-Jervis* (4) went on those lines, but that was the simple case of a fixed jointure. The method adopted in that case would not be fair to the owner of the rentcharge in such a case as this, where the London estates comprise so many reversions necessitating that a greater number of years' purchase should be taken than was done in *In re Parker-Jervis*. (4) Moreover, in that case there was a fixed jointure, whereas in the present case the rentcharge is fixed only so long as the net rents of the London estates exceed 100,000*l*. In the deed poll of 1913 the reference is to a rentcharge of 50,000*l*., not to a rentcharge of 50,000*l*. less duty, because in time the estate duty would be paid off. The deed deals with a rentcharge quite irrespective of duty, and in ascertaining the net income the interest on unpaid estate duty has to be first deducted. Provision is thus made for a decrease in the net rents in any year, but there is also a chance that they may increase in years to come, and in either case the rule in *In re Parker-Jervis* (4) would not work fairly to all parties. In those years in which the rentcharge abates, then as the Viscount's rentcharge will be equal to one-half of the net income from the London estates, after deducting estate duty interest and income tax, he will already have paid that interest and tax and cannot be charged with them over again. His rentcharge will then come out of a fund on which income tax has been already paid: *Brooke* v. *Price*. (5)

Manning K.C. and *J. W. F. Beaumont* for the trustees.

Cur. adv. vult.

Dec. 21. ROMER J. stated the facts above set out and continued: In these circumstances the first question

(1) [1896] 1 Ch. 257.
(2) [1903] 2 Ch. 116.
(3) [1916] 2 Ch. 391.
(4) [1898] 2 Ch. 643.
(5) [1917] A. C. 115.

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that has to be determined is as to what proportion of (*a*) the balance remaining unpaid at the death of the third Viscount Portman of the duty which became assessable upon the death of the second Viscount Portman in respect of the London estates and (*b*) the estate duty which became assessable upon the death of the third Viscount Portman in respect of the London estates should be borne by the yearly rentcharge of 50,000*l.* appointed by the 1911 settlement to the use of the fourth Viscount during his life as subject to abatement under the deed poll of October 15, 1913, and in what manner he ought to contribute to the said estate duty and the interest thereon. The summons also asks for the determination of a similar question in relation to the reversionary yearly rentcharge appointed by the 1911 settlement. But inasmuch as this yearly rentcharge may never arise I am not disposed to decide the latter question at the present time.

It is not, and it could not be disputed that the rentcharge limited to the fourth Viscount must bear some proportion of the estate duty that became assessable upon the death of the third Viscount. The question to be decided is what that proportion should be. The argument before me proceeded upon the footing that my decision upon this point would also determine the question of what proportion should be borne by the rentcharge, of the instalments of estate duty assessable upon the death of the second Viscount remaining unpaid at the death of the third Viscount, and that no distinction in principle exists between the two cases. I therefore express no opinion as to whether there be any distinction or not, and I must not be taken either as assenting to or dissenting from the view that any part of the estate duty that became assessable upon the death of the second Viscount should be borne by the rentcharge, which did not become an interest in possession until the death of the third Viscount.

Now the question as to how estate duty assessable upon real estate is to be apportioned between a person beneficially entitled for his life to a rentcharge issuing out of that estate

and the persons interested in the real estate subject to such rentcharge was considered by Kekewich J. in *In re Parker-Jervis.* (1) The learned judge held in that case, which was the case of a jointure charged upon settled estates, that the jointress must be treated as a tenant for life of a sum equivalent to the capitalized value of the jointure to be ascertained at the same number of years' purchase as that at which the estate as a whole was capitalized for the purpose of duty, and that she must be charged with estate duty on that sum, but was entitled to throw the duty charged against her upon the corpus of the estate on the terms of her paying interest to the tenant for life or in tail or in fee in possession at the rate actually paid to the Commissioners of Inland Revenue until payment of the duty, and thereafter at the rate at which the duty could be raised by mortgage of the estate. In other words, the owner of the jointure was charged in each year with the same proportion of the interest payable for that year in respect of the estate duty whether to the Commissioners or to the mortgagees, including the interest lost to the estate where the duty had been raised out of capital assets of the estate (all of which interest is hereinafter referred to as the estate duty interest), as the jointure bore to the annual value of the whole estate as ascertained for the purposes of calculating its capital value.

It was, however, contended before me that the application of this method of apportionment would not be fair or equitable in the present case, inasmuch as the London estates include a number of reversionary interests, and that for the purpose of arriving at the capital value of the estates a greater number of years' purchase must necessarily be taken than the twenty-four or twenty-five years that were taken in *In re Parker-Jervis.* (1) I feel the force of this contention. It is not difficult to imagine a case in which a rentcharge might exhaust the whole of the income arising from an estate at the time that the duty became assessable. In such a case the whole of the interest on the duty would be borne by the owner of

(1) [1898] 2 Ch. 643.

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the rentcharge, even though, at a subsequent date, the income should become greatly increased by reason of the falling in of reversions. Where, on the other hand, the estate includes a number of wasting properties, the rentcharge might, after a few years, represent a much larger proportion of the income of the estate than it did at the time that the duties were assessed. In such a case the application of the rule in *In re Parker-Jervis* (1) would operate to the detriment of the owners of the estate out of which the rentcharge issued. In these cases the hardship on one side or the other, if hardship there be, could be avoided by directing the owner of the rentcharge to pay to the person beneficially entitled in possession to the estate such a proportion of the estate duty interest in each year as the rentcharge bears to the total income of the estate for that year. To this method, however, there seem to be several objections. It would necessitate the taking of a detailed account of the estate income for each financial year, which would not be completed until some time after the end of that year, and the owner of the rentcharge would not know until that account was completed how much of the estate duty interest had to be borne by him. Furthermore, it would involve a very great departure from the rule in *In re Parker-Jervis* (1), a rule that has, I believe, been universally acted upon in practice during the twenty-five years that have elapsed since it was first adopted. But there is, as it seems to me, another and simpler way in which the hardship to which I have referred may be avoided. The method of valuing the jointure or life rentcharge for the purpose of ascertaining the proper amount of estate duty chargeable against it was rejected, and, if I may respectfully say so, was rightly rejected, by Kekewich J. in *In re Parker-Jervis* (1), for the reasons given by him. In any particular case the actuarial valuation might in the result turn out to be much greater or much smaller than the actual amount of the burden imposed upon the estate by the creation of the jointure or life rentcharge. But in the case of a perpetual rentcharge the same objection to a valuation would not exist. Its value

(1) [1898] 2 Ch. 643.

would, of course, depend upon the rate of interest prevailing for the time being, but I suppose that in general it would be taken at about twenty-five years' purchase. The owner of the jointure or life rentcharge would then be regarded as the tenant for life of the capital sum so arrived at, and would keep down the interest on the estate duty charged upon such capital sum. In other words, he would be in the same position in respect of estate duty as the tenant for life of a capital sum actually charged upon the estate. This method involves very little departure from the method adopted in *In re Parker-Jervis*. (1) For in ordinary cases the two methods would produce precisely the same result, seeing that in ordinary cases—that is to say, in cases where no great fluctuation in income is to be expected—the value of an estate is the capitalized value at the current rate of interest of the present income. In *In re Parker-Jervis* (1), for instance, the value of the estate was taken at twenty-four to twenty-five years' purchase. But in cases where the present income of the estate may be expected to rise or fall considerably in the near future, the two methods would lead to different results. The rentcharge (assuming, of course, that it is adequately secured) would, according to the method I have indicated, be taken at (say) twenty-five years' purchase, even though the estate should be valued at thirty or twenty years' purchase—and this would seem to be fair. For the rentcharge, being fixed, does not rise or fall with the income of the estate, and its value (on the above assumption) in no way depends upon the capital value of the estate as a whole. If a sum of 25,000*l.* be charged upon an estate, it has to bear estate duty at the rate charged upon the estate as a whole, and the tenant for life of that sum is charged with the interest on that duty. If the capitalized value of a perpetual rentcharge of 1000*l.* be 25,000*l.* then an owner of a life rentcharge of 1000*l.* will, according to the method I have indicated, be charged with the like interest, and this too whatever number of years' purchase may have been taken for the valuation of the estate as a whole. According to the method adopted

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in *In re Parker-Jervis* (1) the amount of duty chargeable against the rentcharge varies according to the number of years so taken, and with great respect I cannot see why this should be so. I have accordingly come to the conclusion that, while the rentcharge of 50,000*l.* is payable, the owner should be treated, for the purpose of apportioning estate duty, as the tenant for life of a capital sum charged on the estate equal to the capitalized value, as at the death of the third Viscount, of a perpetual and adequately secured rentcharge of 50,000*l.* This capital sum will be treated as being chargeable with estate duty at the rate charged upon the death of the third Viscount, and the fourth Viscount, as the owner of the 50,000*l.* rentcharge, will, so long as it is payable, have to pay the interest in respect of this duty at a rate ascertained as in *In re Parker-Jervis.* (1) Having regard to what I have already said as to the estate duty assessable upon the death of the second Viscount this capital sum must also be treated as charged with estate duty at nine-sixteenths of the rate charged upon such death, and the fourth Viscount will pay the interest on that duty, but only as from the date of such death.

I must now consider what the rights of the parties will be in the years in which the rentcharge of 50,000*l.* becomes abated in accordance with the provisions of the deed poll of October, 1913. It will be convenient in dealing with this question to consider also the question raised by para. 2 (3.) of the originating summons, as to whether income tax can properly be deducted from the payments of the abated rentcharge. It is not, of course, disputed that income tax should be deducted from the unabated rentcharge of 50,000*l.* It is contended on behalf of the defendant, Viscount Portman, that inasmuch as in any such year the amount of his rentcharge will be equal to one-half of the net income of the London estates after deducting all estate duty interest and income tax, he will in effect have already been charged with estate duty interest and income tax for that year, and cannot be charged with them over again. As regards income tax

(1) [1898] 2 Ch. 643.

in particular he says that his rentcharge will be payable out of a fund in respect of which income tax has already been paid, and that in accordance with or in analogy to the authority of *Brooke* v. *Price* (1), such rentcharge will be tax free. In effect he contends that in any such year he is, for the purposes mentioned, to be treated as though he and the plaintiff were tenants for life in common in equal shares of the London estates. There is such an attractive simplicity about this that I would gladly give effect to it if I could. It seems to me, however, that the deed of October, 1913, does no more than fix the amount of the rentcharge in any particular year in which the event there specified occurs, leaving that rentcharge when so fixed as much subjected to deduction in respect of estate duty and to liability in respect of income tax as was the rentcharge of 50,000*l.* for which it is substituted. Under the 1911 settlement the rentcharge of 50,000*l.* was expressly made subject to deductions for death duties, and was liable at law to be charged with income tax. The deed of October, 1913, expressly revoked the uses and estates of that settlement only to such extent as should be necessary in order to effectuate the appointment then made. I cannot think that the direction that the rentcharge should be subject to a deduction for estate duty is in any way inconsistent with the appointment of the abated rentcharge, or that it was necessary to revoke that direction for the purposes of effectuating the appointment. Nor am I able to arrive at the conclusion that the effect of the appointment is, in the years in which the abatement occurs, to give to Viscount Portman a rentcharge free of income tax. It does not give to him a share in a tax free fund. It merely gives to him a rentcharge of an amount equal to such a share, and leaves him what he was before—namely, the owner of a rentcharge charged upon the whole of the London estates with all the remedies and powers appertaining to such an owner. To give effect to the contention put forward on Viscount Portman's behalf would be to produce a curious result. Suppose that the whole income

(1) [1917] A. C. 115.

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of the year of the London estates after making all deductions, except for estate duty interest, is 130,000*l.*, and that in such year the interest is 30,000*l.* Viscount Portman would be entitled to receive a rentcharge of 50,000*l.* and might have to pay (say) 10,000*l.* estate duty interest. He would thus receive 40,000*l.* net and the plaintiff would get 60,000*l.* net. But now suppose that in the next year the estate income is 10*l.* less. Viscount Portman's rentcharge for that year would be 49,995*l.* If his contention be correct he will receive that sum without further deduction, thus increasing his net income by 9995*l.* over the preceding year, while the plaintiff's income will be reduced from 60,000*l.*, to 49,995*l.* and this as the result of the provisions of a deed that was presumably designed to lighten the burden upon the plaintiff in each year when the net income had sunk below 100,000*l.* A similar result would be brought about by giving effect to Viscount Portman's contention as to the deduction of income tax. If income tax be taken at 4*s.* in the 1*l.* he would while the rentcharge is 50,000*l.* receive 40,000*l.* If his contention as to income tax be correct, he will in any year in which the net income of the estates is less than 100,000*l.* but more than 80,000*l.* be actually better off than when it is 100,000*l.* or over, and this at the expense of the plaintiff.

I come therefore to the conclusion that the abated rentcharge will continue to be liable to both estate duty interest and income tax. So far as regards estate duty interest it was contended for the plaintiff that in any year in which the abated rentcharge was payable such interest should be equally divided between the fourth Viscount and the person entitled to the income of the London estates. This, however, would or might throw a larger proportion of the interest upon the estate owner than is equitable, and I see no way of fairly adjusting the burden otherwise than by ascertaining in every such year the capitalized value as at the death of the third Viscount of a perpetual and adequately secured rentcharge of the abated amount and treating such capitalized sum as charged with estate duty at the rates I have mentioned.

The fourth Viscount will then have to pay for that year the interest upon the duty so ascertained.

Solicitors for plaintiff and the defendant trustees: *Wilde, Wigston & Sapte.*

Solicitors for the defendant Viscount and his eldest son: *Greenfield & Cracknall.*

Solicitors for the infant defendants: *Rawle, Johnstone & Co.*

R. M.

In re SUAREZ (No. 2).

[1920. S. 192.]

Land Transfer—Registration with absolute Title—First registered Proprietor—Estate in Fee Simple—Crown's Right to Escheat—Land Transfer Act, 1875 (38 & 39 *Vict.* c. 87), *ss.* 7, 105—*Land Transfer Act*, 1897 (60 & 61 *Vict.* c. 65), *s.* 16.

The first registration of any person as proprietor of freehold land with an absolute title has, by virtue of s. 7 of the Land Transfer Act, 1875, the effect of barring any claim to the land already accrued to the Crown by way of escheat.

Sect. 105 of the Land Transfer Act, 1875, merely preserves the right of the Crown to any escheat or forfeiture by reason of the death of the registered proprietor, or of anybody claiming through him, subsequent to the first registration.

ADJOURNED SUMMONS.

Francisco Suarez died on February 10, 1897, intestate, seised in fee simple of a certain freehold house.

On January 17, 1914, his nephew, claiming to be his heir at law, was registered with an absolute title to the house in question. The applicants, who were judgment creditors of Pedro Suarez, had issued an originating summons on January 16, 1920, for accounts and inquiries with the object of enforcing s. 4 of the Judgments Act, 1864, in respect of four judgment debts and costs incurred in an administration action in which Pedro Suarez was defendant: see *In re Suarez* (1),

(1) [1917] 2 Ch. 131; [1918] 1 Ch. 176.

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in which the applicants obtained a judgment against him to pay moneys amounting to about 16,000*l.* into Court. On December 5, 1917, the applicants issued a writ of sequestration in that action to try and enforce that order. Subsequently it was arranged that the sequestrators should go out of possession of the house and enable the applicants to obtain an order for sale, and the Crown, who on December 15, 1917, had put a caution on the register on the ground that Francisco Suarez died without any heir, consented to withdraw the caution on the understanding that the proceeds of sale were to be lodged in Court and that the Crown's rights were not to be thereby affected. The house had been sold and the money paid into Court, and the only question which now arose for determination was as to the effect upon the rights of the Crown of the registration of Pedro Suarez with an absolute title.

Beebee for the applicants. The interest (if any) of the Crown accrued when Francisco died intestate and without heirs in 1897, and was an estate or interest in the Crown at the time of registration of Pedro Suarez, and became barred by virtue of the express words of s. 7 of the Land Transfer Act, 1875. (1) Sect. 105 of that Act (2) does not apply, because it merely preserves the rights of the Crown in the event of any escheat arising after the date of registration. Registration is only compulsory under s. 20 of the Land Transfer Act, 1897, upon the first conveyance on sale after the specified day, in order that the purchaser may acquire the legal estate; but after first registration the property may

(1) Land Transfer Act, 1875, s. 7, provides: "The first registration of any person as proprietor of freehold land (in this Act referred to as first registered proprietor) with an absolute title, shall vest in the person so registered an estate in fee simple in such land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:—

(1.) . . . .
(2.) . . . .
(3.) . . . .

but free from all other estates and interests whatsoever including estates and interests of Her Majesty, her heirs and successors."

(2) Land Transfer Act, 1875, s. 105, provides: "Nothing in this Act shall affect any right of Her Majesty to any escheat or forfeiture."

be effectively dealt with off the register: *Capital and Counties Bank* v. *Rhodes* (1), and s. 105 would apply to a case where the property has been dealt with off the register and the ultimate purchaser dies intestate and without heirs.

The effect of s. 7 of the Land Transfer Act, 1875, is to vest an estate in fee simple in the first proprietor "free from all other estates and interests whatsoever including estates and interests of Her Majesty, her heirs and successors," and under s. 16 of the Act of 1897, a purchaser cannot ask for an abstract of title from a vendor who is registered with an absolute title, nor, apart from special stipulation, can the vendor be required to give any covenant for title; but if the Crown is right in the present case, all that has gone by the board.

Escheat is a matter entirely of tenure, but is not easy to define. It is not a reversion. It is referred to as an estate or interest in the interpretation clause of the Real Property Limitation Act, 1833; Carson's Real Property Statutes, 2nd ed., p. 114, and escheat is described on p. 122 of the same work with a reference to various decisions. In the case of a mesne lord the estate begins at the moment of the death of the tenant; Co. Litt. 18b, n. (2.), by Mr. Hargrave, where escheat is further described, but the lord must do some further act, either enter or bring his writ of escheat; and similarly in the case of the Crown, although the title to take possession commenced immediately on the want of a tenant, the Crown had to have an inquest, so that its title became a matter of record. It was admitted by counsel in *Doe* v. *Redfern* (2) that upon the death of the King's tenant without heirs, the King is taken to be in the actual possession of the land before office found; but Lord Ellenborough C.J. in his judgment questioned whether that admission was not too wide. When Francisco Suarez died without heirs the Crown then had a present estate or interest within the meaning of s. 7.

The question of escheat was dealt with in *Attorney-General of Ontario* v. *Mercer* (3), in which an estate or interest

(1) [1903] 1 Ch. 631. (2) (1810) 12 East, 96, 103.
(3) (1883) 8 App. Cas. 767.

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in what had already accrued was regarded as coming within the word "lands," but a right to lands which might thereafter escheat was regarded as covered by the word "royalties." That illustrates the difference which I seek to draw between the effect of ss. 7 and 105 of the Act of 1875, the former, I submit, relating to estates and interests which had already accrued by escheat, and the latter dealing with the Crown's rights in futuro.

The whole law of escheat was discussed in an article by Mr. Frederick Hardman in the Law Quarterly Review (1), and as part of my argument I cite the passage where he says: "Where a person seised of lands in fee dies intestate and without heirs, and no mesne lord is proved to exist, the right of escheat at once accrues to the Crown, and the title and possession are cast upon the King at common law."

Dighton Pollock for the Attorney-General. I cannot dispute that as soon as the right of the tenant in fee simple determines the legal interest remains in the Crown. Sir G. Jessel M.R. in *In re Mercer & Moore* (2) called it a reverter to the Crown. It is not a remainder or reversion of any kind, the right comes into existence by reason of a failure of tenure and is no part of the tenure in a sense; it arises in connection with, but not out of, tenure. In face of the authorities it is not possible to deny that the estate of the Crown, whatever form it takes, arises on the happening of the event on which the escheat takes place. There may be cases where the Crown has an estate in law without office found: Staunford's Prerogative of the Crown. But whatever the effect of that may be under s. 7 of the Land Transfer Act, 1875, s. 105 is without any qualification whatever. It is absolute, and, I submit, governs the position. If it only relates to cases of escheat happening after registration with an absolute title, the provision would not have been necessary. Sect. 105 saves the Crown's right to any escheat or forfeiture, although other rights of the Crown are barred by registration: Brickdale and Sheldon's Land Transfer Acts, 2nd ed., p. 235.

(1) (1888) Vol. iv., p. 336. (2) (1880) 14 Ch. D. 287, 295.

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ROMER J. The short facts giving rise to the question that I have to determine upon the Land Transfer Act, 1875, are these. One Francisco Suarez died in the year 1897 seised of an estate in fee simple in certain land. He died intestate. It is said on behalf of the Crown that he died without any heir, and that thereupon the right to the land reverted to the Crown by way of escheat. In the year 1917, however, one Pedro Suarez, claiming as the heir at law of Francisco, caused himself to be registered under the Land Transfer Act as the proprietor of this freehold land with an absolute title. The land has since been sold, and the summons before me has been issued for the purpose of obtaining a distribution of the proceeds of such sale. It is urged by the Attorney-General that the Crown is entitled to those proceeds on the ground that the land reverted to the Crown in the year 1897 by way of escheat. The reason why the Crown now claims the proceeds of the sale instead of the land itself is that an arrangement was come to between the parties by which the land should be sold, any right the Crown might have had to the land by escheat being transferred from the land to the purchase money. Sect. 7 of the Land Transfer Act, 1875, prescribes the result of the first registration of a person as proprietor of freehold land with an absolute title, and prescribes it in this way: "The first registration of any person as proprietor of freehold land (in this Act referred to as first registered proprietor), with an absolute title, shall vest in the person so registered an estate in fee simple in such land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows." Then there are three sub-paragraphs, which I can pass over, specifying certain liabilities, incumbrances, and so forth, to which the land will still remain subject; and then the section concludes in this way: "but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors."

The first question which arises is whether the Crown ever had any "estate" or "interest" in this land. In my opinion, whatever may be the proper description of the

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right of the Crown to claim land by escheat in the future event of the tenant in fee simple dying without heirs, when once the event has happened the Crown has an estate and interest in the land even without any inquest of office. I think that that is not seriously disputed on the part of the Crown, and therefore I do not find it necessary to refer to the authorities to which Mr. Beebee has called my attention. I will only say this: that in my opinion the law is correctly stated by Mr. Hardman in an article in the Law Quarterly Review, iv., 318. He says on p. 336: "Where a person seised of lands in fee dies intestate and without heirs, and no mesne lord is proved to exist, the right of escheat at once accrues to the Crown, and the title and possession are cast upon the king at common law. Notwithstanding the doubts expressed by Lord Ellenborough (12 East, 109, 110), it is believed to be the better opinion that an inquest of office is only a proceeding to ascertain the title of the Crown by escheat, and not an essential condition to the vesting of such title, 'or else the freehold should be in suspense, which may not be' (Staunf. Prerog. 54A). But the law vests in the king nothing more than a bare right, and no beneficial enjoyment of the property can in general be had until after office found." I come therefore to the conclusion that if s. 7 stood by itself the Crown in respect of its claim that the land escheated to the Crown on the death of Francisco Suarez is barred; that is to say, that the registration of Pedro as an absolute owner vested the property in him free from that claim of the Crown which, in my opinion, was an estate and interest of His Majesty.

But reliance is placed, on behalf of the Crown, upon s. 105 of the same Act. That section provides: "Nothing in this Act contained shall affect any right of Her Majesty to any escheat or forfeiture." It is said that that is a qualification of s. 7, and that the freehold land was not vested in Pedro Suarez free from the estate or interest of the Crown subsisting therein by virtue of the escheat. If I acceded to that contention it appears to me that I should be cutting right across the whole of the Land Transfer Act of 1875, because

it would follow that no one could safely take a title from the person registered as proprietor of a fee simple estate with an absolute interest without an investigation going back I do not know how many years, for the purpose of seeing whether at any period at any place in the chain of his title the title was derived through an intestacy. Should it appear that this was so, then it would be necessary for the purchaser to investigate closely the right of the person who assumed to take the property as heir at law, for the purposes of seeing whether or not there was any ground for the contention that the Crown had a right to claim by escheat. In point of fact s. 16 of the Land Transfer Act of 1897 prohibits in ordinary circumstances a purchaser from a registered proprietor with an absolute title from having an abstract of title; he is not even entitled to call for any covenant for title. I should hesitate, therefore, to adopt the construction which Mr. Pollock urges me to adopt unless I was absolutely driven to do so. It appears to me that I am not driven to do so. Having regard to the construction which I have put upon s. 7 there may be at first sight some inconsistency between that section and s. 105. It is my duty if I can to place such a construction upon s. 105 as to avoid that inconsistency. It appears to me that the section is capable of such a construction, and a construction that is in keeping with the scheme of the Act. Looking at the words of s. 7, which provide that the property shall vest in the first registered proprietor free from all estates and interests of Her Majesty, it might have been contended that the Act had vested the property in him in such a way that if he or any person claiming through him should subsequently die without heirs, the Crown's claim to the property in that event by way of escheat had been defeated. I do not think myself that such would be the effect of the section. Certainly it could not have been the intention of the Legislature. But, to make it perfectly clear that that was not the effect of the section, s. 105 was introduced. In my opinion that section merely provides that the right of the Crown to any escheat or forfeiture by reason of the death of the registered proprietor, or of anybody claiming through

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him, without heirs, is not to be affected. That, in my opinion, is the meaning and the only meaning of s. 105. So reading it, ss. 7 and 105 work very well together, and the title of a proprietor of a fee simple estate registered with an absolute title will not be subject to the risk which Mr. Pollock, on behalf of the Crown, contends that it is subjected to, of being destroyed by reason of an escheat which may have happened a great number of years before the registration.

I therefore come to the conclusion that, assuming that the Crown on the death of Francisco Suarez became entitled to this property by way of escheat, the registration of Pedro with an absolute title in 1917 vested the property in him free from that estate or interest of the Crown.

Solicitors for applicants: *Darley, Cumberland & Co.*
Solicitor for Crown: *The Treasury Solicitor.*

R. M.

ROMER J. 1924 *Jan.* 30.

In re GOODWIN.

AINSLIE *v.* GOODWIN.

[1923. G. 1680.]

Will—Condition—Annuity to Wife conditional upon her Release within Six Months of a Smaller Annuity secured by Testator's Covenant—Incumbered Estate—Impossible to pay either Annuity during Wife's Life—Death of Wife without executing any Release—Personal Condition—Position of Parties—Sufficient Release by Wife's Executors.

A testator, who died on November 1, 1906, bequeathed an annuity of 500*l.* to his wife to commence from the day of his death, the first payment to be made at the expiration of three calendar months from his decease, and he declared that the annuity was intended to be in lieu of and in substitution for the annuity of 70*l.*, which he had covenanted by deed to pay to his wife, and that the bequest thereof should become and be absolutely void and of no effect unless his wife should within six calendar months after his death absolutely release and discharge his estate, effects and trustees from payment of the 70*l.* annuity as from the date of his death. There was a gift of residue in the will but no gift over of the annuity on failure to comply with the condition. Owing to heavy incumbrances it remained doubtful during the life of

the widow whether the estate would produce anything for the beneficiaries, and she died on February 10, 1921, without having done anything specifically during her life to comply with the condition. The trustees being now in a position to make payments to beneficiaries raised the question whether the annuity had not been forfeited by non-compliance with the condition:—

Held, that the condition was not personal to the annuitant so as to be performed only by her, and that a present release by her executors, which would put all parties in the position intended by the testator, would be a sufficient compliance with the condition.

In re Packard [1920] 1 Ch. 596 adopted.

ADJOURNED SUMMONS.

The testator bequeathed by his will to his trustees, the plaintiffs, during the life of his wife an annuity of 300*l*., subsequently increased by codicil to 500*l*., commencing from the date of his death and to be payable quarterly, the first payment to be made at the expiration of three calendar months from his decease and to be charged exclusively (in exoneration of the rest of his estate) upon and issuing and payable out of certain leasehold properties therein mentioned, and the will then contained the following declaration: "And I declare that my Trustees shall stand possessed of the said annuity upon trust to pay the same as and when received to my said wife Provided always and I declare that the said annuity is intended to be in lieu of and in substitution for the annuity of 70*l*. per annum which I have covenanted by deed to pay to my said wife and that the bequest thereof herein contained and the trusts thereof hereby declared shall become and be absolutely void and of no effect (except as regards any money actually paid to my said wife on account of the said annuity) unless my wife shall within six calendar months after my death absolutely release and discharge my estate and effects and my Trustees from payment of the said annuity of 70*l*. per annum so covenanted to be paid by me to my said wife as aforesaid as from the date of my death to the satisfaction in all things of my Trustees." The will contained a residuary gift, but no gift over of the annuity on failure of the widow to comply with the condition.

The testator died on November 1, 1906, and was at the time of his death indebted in large sums to numerous incumbrancers

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who held mortgages upon his estate, so that the plaintiffs for many years found it impossible to make any payments to the beneficiaries under his will. After carefully nursing the estate, they had now reduced the charges thereon sufficiently to enable them to commence making payments to the beneficiaries. The widow died on February 10, 1921, and her executors were defendants to this summons, which raised the question whether, in the events which had happened, they were entitled to claim payment of the annuity of 500*l.* conditionally bequeathed to her by the will, from the death of the testator to the date of her own death, so far as the premises charged therewith by the will were sufficient to pay the same, or whether her failure to comply with the condition imposed upon her by the will deprived her of the right to the annuity of 500*l.*

The widow never received, nor had her executors since her death ever received, any payments in respect either of the annuity of 70*l.*, or of the larger annuity of 500*l.*, as from the date of the testator's death. The arrears of the 70*l.* annuity down to the testator's death were not satisfied until November, 1923. Nothing was specifically done by the widow during her life to comply with the condition expressed in the will, and upon the correspondence which took place subsequent to the testator's death, his Lordship came to the conclusion that he could not imply on the one hand any release by the widow or on the other hand any election on her part to retain her right to enforce the covenant so far as concerned any arrears of the 70*l.* annuity accruing after the testator's death.

Bryan Farrer for the trustees.

Eardley-Wilmot for the defendant residuary legatee. A condition was attached to this annuity which was never performed by the annuitant. The limit of six months may be regarded as only a directory provision: *In re Packard* (1), but the condition must be performed at some time or another by the annuitant, and she died without performing it. The

(1) [1920] 1 Ch. 596.

annuity was consequently forfeited. If she were now alive she could execute the release and that might be good, as in *Hollinrake* v. *Lister* (1), but the condition was personal to her and cannot be performed by her executors. The annuity of 70*l.* was only payable to her for life and was a personal annuity to her; and the condition was that she herself should release it. If the testator has not prescribed any period and "the condition is one to be performed by the donee personally, not requiring the intervention or concurrence of any other person, the period for the performance of the condition is necessarily the life of the donee and no longer, and the condition is not complied with if the donee dies without having performed it": Halsbury's Laws of England, vol. xxviii., "Wills," p. 594, citing *In re Greenwood* (2) and *Patching* v. *Barnett.* (3) I submit that even if the time limit of six months need not be observed, yet that this condition was personal to her and must be complied with by her at some time during her life, and that as she did not release it or show any intention of releasing it during her life, the annuity is forfeited.

Hughes K.C. and *Bradley Dyne* for the widow's executors. The first payment of the annuity was to be made at the expiration of three calendar months from the testator's death, and the widow was to have six months in which to release the other annuity; the condition is therefore a condition subsequent. The time limit of six months cannot be, and is not, insisted upon, having regard to the decision in *In re Packard.* (4) Where there is no gift over, then the Court looks at the sense and purpose of the condition, and if the annuitant's executors can release the covenant as well as she could have done, that will satisfy the condition. "Where the condition gives an option to the legatee to perform one of two or more things, within a particular period, previously to the vesting of the bequest, if the legatee die before the expiration of the time without having elected,

(1) (1826) 1 Russ. 500.
(2) [1902] 2 Ch. 198, 204, 205; [1903] 1 Ch. 749.
(3) (1881) 51 L. J. (Ch.) 74.
(4) [1920] 1 Ch. 596.

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the right of election may be exercised by his executors": Roper on Legacies, 4th ed. p. 777, citing *Eastwood* v. *Vinke*. (1)

The expressed purpose of this condition was that the 70*l*. and 500*l*. annuities should not both be payable, and a present release by these defendants will fulfil that purpose in all respects. They are willing to give any such release as the plaintiffs may require.

ROMER J. [after stating the material provisions of the will and the facts above set out and the conclusions to which he had come upon the correspondence as above mentioned continued]: The question then arises whether, having regard to the fact that the lady never released the testator's estate from the liability under the covenant in respect of the 70*l*. annuity, the condition which I have read is operative so as to deprive her estate of all claim to the annuity of 500*l*. a year from the death of the testator down to the death of the annuitant. Nothing was ever paid to her during her life in respect of this 500*l*. annuity, nor indeed was her claim as a creditor of the testator at his death, ever completely satisfied until the month of November, 1923. It is well settled by authority that where a gift in a will is made subject to a condition, even a condition precedent, to be performed within a specified time, but the condition is not in fact performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the Court to determine whether the time so specified was of the essence of the matter. In determining that question the Court must have regard to what was presumably the intention of the testator in inserting the condition, what it was that he desired to bring about or to guard against; and if the Court finds that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in substantially the same position as they would have

(1) (1731) 2 P. Wms. 613.

been in had the condition been performed within the proper time, time is not regarded as of the essence, and such performance is treated as a sufficient compliance with the condition.

In the present case there can, I think, be no doubt that the only object of the testator in imposing the condition that the 70*l.* annuity should be released was that the lady should not be paid both the annuity and the 70*l.* a year. His only object in fixing a time within which the release should be executed was to enable the executors to make an early distribution of his estate amongst the beneficiaries. In point of fact, as I have already said, the 500*l.* a year was never paid, nor was any part of it, and indeed, having regard to the state of the testator's assets, it was not possible to pay any beneficiary during her lifetime. If therefore she were now living and were to release her claim to the 70*l.* a year as from the testator's death, she would have complied in substance with the condition and done that which the testator intended should be done. An execution of a release by her at the present time would, so far as the other parties are concerned, have precisely the same effect as though she had executed the release within the six months specified by the testator. If therefore she were still living, I should have no hesitation in saying, following the authority to which my attention has been called, that an execution of the release by her now would be a sufficient compliance with the condition expressed in the testator's will.

It has however been argued by Mr. Eardley-Wilmot that, although that might be so, if she were now living, yet, inasmuch as she is dead, the performance of the condition was one so personal to her that it cannot be done by her legal personal representative. In the case of a gift made by a will of a legacy of 1000*l.* upon the condition that the legatee should within a specified time release the testator's estate from a debt, if a release after the time specified would be a substantial compliance with the condition and the time was not of the essence, it appears to me that it would be immaterial whether the release were made by the legatee

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or his legal personal representative. I do not think that this was disputed by Mr. Eardley-Wilmot. He argued, however, that the condition here is a condition personal to the annuitant, because the benefit taken by her under the will is one that ceases with her life and the annuity under the deed of covenant is one that also ceases with her life. That, in my opinion, does not make the condition a condition personal to the annuitant any more than the condition was personal to the legatee in the case mentioned above. In what respect the claim of the executors of the annuitant in respect of the arrears of the two annuities of 500*l.* and 70*l.* differs from the claim of the executors of the legatee to the legacy and the debt, I cannot myself understand. It does not appear to me that this condition was a condition in any sense personal to the annuitant. If in any case the condition be really personal to the legatee it cannot of course be complied with by the legatee's executors. Such a condition as a condition to take and use a name, or to marry, or to occupy a house, or any condition of that sort, is no doubt personal to the legatee. This one is not; and inasmuch as a release at the present time of the 70*l.* annuity will put all the parties in the position which the testator intended that they should occupy and will place them in the same position as though a release had been executed by the lady within six months of the testator's death, I hold that a release by her executors will be a sufficient compliance with the condition.

Solicitors for plaintiffs and defendant residuary legatee: *Dawson & Co.*

Solicitors for defendant executors: *Leader, Plunkett & Leader, for George Gardner Leader, Newbury.*

R. M.

Referred to. EBBW VALE U. D. C. *v.* SOUTH WALES TRAFFIC AREA LICENSING AUTHORITY [1951] 2 K. B. 366

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[1923. B. 260.]

SAME *v.* CROWTHER AND OSBORN, LIMITED.

[1923. B. 1036.]

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March 27; *April* 2.

Company—Infringement of Patent—Directors—Liability.

The directors of a company cannot be made liable for an infringement of patent by the company merely by reason of their position as directors, even in a case where they are the sole directors and shareholders of the infringing company.

Rainham Chemical Works v. *Belvedere Fish Guano Co.* [1921] 2 A. C. 465 applied.

Betts v. *De Vitre* (1868) L. R. 3 Ch. 429 and *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co.* (1899) 16 R. P. C. 344 distinguished.

THE judgment in these two actions was given together.

BRITISH THOMSON-HOUSTON COMPANY, LIMITED *v.* STERLING ACCESSORIES, LIMITED.

The following statement of the facts in this action is taken from the judgment.

This is an action to restrain the infringement of Letters Patent No. 23499 of 1909 for an invention for improvements in and relating to the treatment of tungsten to facilitate working. The Letters Patent in question were recently held to be valid in an action by the plaintiffs against other defendants, which was tried before Russell J.

The first of the defendants is a limited company which was registered in December, 1921, with a capital of 1000*l.* divided into 1000 shares of 1*l.*, and is a private company. The second and third defendants are the sole directors of the company and the only subscribers to the memorandum of association and the only shareholders.

The defendants admit the validity of the Letters Patent and the title of the plaintiffs thereto. They also admit the sales by the defendant company alleged in the particulars of breaches, of certain electric lamps, and that the filaments of such lamps were made in accordance with the invention

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protected by the Letters Patent and accordingly that such sales were infringements. Upon the footing of these admissions the defendant company was not in a position at the trial to resist judgment. The defendant directors, however, contended that no relief in the circumstances of this case could be given against them.

The statement of claim alleges that the defendant directors "are and were at all material times officials and/or directors of the defendant company and actively engaged in the affairs of the said company and as such officials and/or directors authorised, permitted and/or took part in the said infringements."

At the trial the facts as to the position of these two directors as stated above were admitted, but no other facts were alleged or proved.

Sir A. Colefax K.C. and *Trevor Watson* for the plaintiffs. The defendant company is a mere cloak behind which infringements of the plaintiffs' patent are effected by the defendant directors. They are therefore liable in respect of the infringements: *Betts* v. *De Vitré*. (1) The company is these defendants' agents to carry out the infringements and both principals and agents are liable. So in *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co.* (2), an injunction was granted in respect of infringements of patent against the secretary to the defendant company. It was there said that officers of a company may be liable in respect of acts done by them in that capacity. In *Leeds Forge Co.* v. *Deighton's Patent Flue and Tube Co.* (3) the directors were made parties and sued merely as agents of the company, and the action against them was dismissed; but there was no evidence there from which it could be inferred that the directors had authorized the acts complained of.

[TOMLIN J. The inference from that case seems to be that the mere fact that persons are directors of an infringing company gives no remedy against them.]

It is not suggested that it does in an ordinary case. Here,

(1) L. R. 3 Ch. 429, 441. (2) 16 R. P. C. 344, 356.
(3) (1901) 18 R. P. C. 233, 240.

however, the two directors are the sole shareholders also and the company is their creature. Similarly *Cropper Minerva Machines* v. *Cropper, Charlton & Co.* (1) was the normal case of a substantial company infringing whilst carrying on business in its ordinary way. In *Adair* v. *Young* (2) an injunction was granted against the master of a ship fitted exclusively with infringing pumps.

This case is really covered by the decision in *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co.* (3) and *Betts* v. *De Vitré.* (4)

F. W. Theeman for the defendant company.

Courtney Terrell for the defendant directors. There is no authority in which the question of the liability of directors of a company in an action for infringement of patent by the company has been fully argued; but the question has been considered in reference to tort generally, and it is well settled that the directors of a company can never be made liable simply by reason of their being the directors for the tort of the company: *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* (5); *Performing Right Society* v. *Ciryl Theatrical Syndicate.* (6) In both these cases *Betts* v. *De Vitré* (4) was cited but not followed, and it is submitted that it can only be held good law on the ground that the infringement was there regarded as having been done by the directors' servants. *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co.* (7), really has no bearing on the present case.

Sir A. Colefax K.C. in reply. Neither of the cases cited on behalf of the defendant directors goes as far as to cover such a case as this. Further *Betts* v. *De Vitré* (4) is still good law and was not overruled by the House of Lords in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* (5), though it appears to have been discussed by Younger L.J. on the hearing of that case by the Court of Appeal. (8)

TOMLIN J. I propose to hear the next case before giving any judgment.

(1) (1906) 23 R. P. C. 388.
(2) (1879) 12 Ch. D. 13.
(3) 16 R. P. C. 344, 356.
(4) L. R. 3 Ch. 429, 441.
(5) [1921] 2 A. C. 465, 468, 473.
(6) [1924] 1 K. B. 1, 13.
(7) 16 R. P. C. 344.
(8) [1920] 2 K. B. 487, 521.

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BRITISH THOMSON-HOUSTON COMPANY LIMITED *v.* CROWTHER AND OSBORN, LIMITED.

The following statement of the facts is taken from the judgment :—

This action is by the same plaintiffs in respect of the same Letters Patent, but is against another company and its directors. The defendants make admissions in this action corresponding mutatis mutandis with those made by the defendants in the first action. The defendant company has therefore no defence, but the liability of the defendant directors is asserted on the one hand and denied on the other hand upon the same grounds as in the first action.

In this case, however, the facts as to the position of the defendant directors are somewhat different. The capital of the defendant company is 25,000*l.*, divided into 25,000 shares of 1*l.*, of which 24,898 shares have been issued. These shares are held as to 24,398 by the defendant Porritt, as to 50 shares by the defendant Crowther, as to 400 shares by the defendant Osborn, and as to the remaining 50 shares by a person who is neither a director nor a party to the action. No other fact bearing upon the question of the liability of the defendant directors was proved or alleged except that an agreement was put in by the plaintiffs which is said to have some bearing on the matter. This agreement, which is dated August 16, 1922, is made between the defendant company of the one part and a Scottish company of the other part, and provides for the sale by the defendant company to the Scottish company of electric lamps. The agreement is signed by the defendant directors "for and on behalf of" the defendant company, and the seal of the defendant company is affixed. The lamps the subject matter of the agreement are defined as lamps manufactured by the defendant company "whether under patent specifications, licence from patentees, or where the patent protection rights have expired." The agreement also contains a guarantee by the defendant company that the lamps sold do not infringe any existing patent and an indemnity by the

defendant company to the Scottish company, their factors, members and customers, against claims by any party alleging infringement.

Sir A. Colefax K.C. and *Trevor Watson* for the plaintiffs adopted their arguments as to the law in the first case and relied on the facts on the agreement with the Scottish company.

Moritz for the defendant company.

Greene K.C. and *H. B. Vaisey* for the defendants Porritt and Crowther adopted the arguments on behalf of the defendant directors in the first case, and contended further that in *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co.* (1) an injunction was granted against the secretary of the defendant company, because by his actions and his attitude at the trial he was threatening himself to infringe the plaintiffs' patent. The agreement with the Scottish company had no bearing on the case. It was clearly an agreement under which the defendant company were agreeing to supply uninfringing lamps, and the indemnity given to the Scottish company was merely inserted ex abundanti cautela to meet the case of any accidental infringement in lamps supplied.

The defendant Osborn appeared in person.

Cur. adv. vult.

April 2. TOMLIN J. delivered a written judgment, in which after stating the facts in the first action, he continued: Now I apprehend that where it is sought to fix a defendant with liability for a tort it must be established either that he is himself the tortfeasor or that he is the employer or principal of the tortfeasor, in relation to the act complained of, or at any rate the person on whose instructions the tort has been committed.

In the present case it is not alleged that the defendant directors were the actual tortfeasors. It is therefore sought to fix them with liability by contending, first, that in the circumstances of the case the defendant company was only a

(1) 16 R. P. C. 344, 356.

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cloak under cover of which the infringements were committed by the defendant directors, or in other words that the defendant company was the agent of the defendant directors to commit the infringements, and secondly, that the true inference from the facts is that the defendant directors authorized the acts of infringement.

There is no evidence of any fact pointing to the relation of principal and agent having been established between the defendant directors and the company, unless the fact that the defendant directors were the sole directors and the sole shareholders of the company can be properly regarded as a circumstance from which the relationship ought to be inferred.

I do not think that any such inference can be or ought to be drawn. It has been made plain by the House of Lords that for the purpose of establishing contractual liability it is not possible, even in the case of the so-called one man companies, to go behind the legal corporate entity of the company and treat the creator and controller of the company as the real contractor merely because he is the creator and controller. If he is to be fixed with liability as principal, the agency of the company must be established substantively and cannot be inferred from the holding of director's office and the control of the shares alone: see *Salomon* v. *Salomon & Co.* (1) Any other conclusion would have nullified the purpose for which the creation of limited companies was authorized by the Legislature. Nor does the matter stand otherwise in regard to liability for tortious acts. This also has been made plain by the House of Lords in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* (2), where Lord Buckmaster in criticizing the view of one of the Lord Justices in the Court below to the effect that it was possible to look behind the company, states the position in this way: "It not infrequently happens in the course of legal proceedings that parties who find they have a limited company as debtor with all its paid-up capital issued in the form of fully-paid shares and no free capital for working suggest that the company is nothing but an alter ego for the people by whose hand it has

(1) [1897] A. C. 22. (2) [1921] 2 A. C. 465, 475.

been incorporated, and by whose action it is controlled. But in truth the Companies Acts expressly contemplate that people may substitute the limited liability of a company for the unlimited liability of the individual, with the object that by this means enterprise and adventure may be encouraged. A company, therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence. In the case of *Salomon* v. *Salomon & Co.* (1) parties who sought to disregard the existence of the company on these grounds were unable to establish this fact, and they accordingly failed, but the respondents urge that here the position is quite plain. It seems to have been so regarded by Scrutton L.J. The Master of the Rolls thought the same result was reached by considering that the company was in fact under the sole control of Messrs. Feldman and Partridge as governing directors, and Atkin L.J. by the analogy of cases such as *Penny* v. *Wimbledon Urban Council.* (2) I cannot accept either of these views. If the company was really trading independently on its own account, the fact that it was directed by Messrs. Feldman and Partridge would not render them responsible for its tortious acts unless, indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads."

I have, however, had pressed upon me the case of *Betts* v. *De Vitré.* (3) The action there was one for infringement of patent rights against the company and its directors, and the decision was one of Lord Chelmsford L.C. sitting on

(1) [1897] A. C. 22. (2) [1899] 2 Q. B. 72.
(3) L. R. 3 Ch. 441.

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appeal from Wood V.-C. The decision is therefore binding on me so far as it is a decision which is not overruled and which lays down any principle applicable to the circumstances of the present case. It may be that the decision is to-day open to criticism having regard to the principles more recently enunciated by the House of Lords in the cases to which I have referred. It was, I think, regarded by Younger L.J. in the *Rainham Case* (1) as a decision requiring some explanation, and he suggests that it turned on some special act of intervention on the part of the directors. At any rate the directors there pleaded that the infringement had been by their servants against their orders, and the reasoning of Lord Chelmsford was upon the footing that the actual infringers were the servants of the directors. That is a condition of things which has not been alleged in the present case, and in my judgment Lord Chelmsford's decision has no application to the facts of the present case.

I think therefore that the plaintiffs' first contention fails.

As to their second contention, the answer must be that there is no evidence from which it ought or can be inferred that the defendant directors have authorized the wrongful acts. To draw that inference from the fact that they are sole directors and shareholders of the defendant company would be manifestly wrong and contrary to the principles enunciated by the House of Lords in the cases already referred to, and there is no evidence of any other facts at all in relation to the matter.

The decision in *Welsbach Incandescent Gas Light Co.* v. *Daylight Incandescent Mantle Co.* (2) before Byrne J., to which I have been referred, turned exclusively upon circumstances of pleading and of conduct at the trial, which are not present in this case, and in my judgment it affords no guidance on any question of principle.

It follows that the plaintiffs' second contention also fails.

The result therefore is that the action has succeeded against the defendant company but failed against the defendant directors. An injunction, an order for delivery up of

(1) [1920] 2 K. B. 487, 521. (2) 16 R. P. C. 344.

infringing articles, and an inquiry as to damages, are the appropriate remedies against the defendant company, which must pay the costs of the action except so far as they have been increased by the joinder of the defendant directors, the costs of the inquiry being reserved. As against the defendant directors the action is dismissed with costs. The judgment will be drawn up and be dated as of last Thursday, March 27, but the costs of the action will include the costs, if any, of to-day.

[His Lordship then stated the facts in the second action, and after referring to the agreement between the defendant company and the Scottish company, continued:] Now unless there is something in the fact of this agreement which distinguishes this case from the first case, my judgment in the first case applies with equal or even greater force. I am unable to see that the agreement in question has any bearing upon this question at all. It seems to indicate: (1.) that the defendant company was not in the transaction with the Scottish company contemplating the infringement of any patent rights, and (2.) that the Scottish company, with a prudence which cannot be regarded as otherwise than reasonable, required an indemnity against possible accidents. In my judgment the plaintiffs' case receives no support from the existence of this agreement. The result therefore must be the same as in the first case, with this addition that, as there was here a counterclaim for revocation (which was not, however, opened), this counterclaim will be dismissed with costs with the usual set-off so far as the defendant directors are concerned.

Solicitors for plaintiffs: *Bristows, Cooke & Carpmael.*

Solicitor for the defendants in the first action: *C. R. A. Edmonds.*

Solicitors for the defendant company in the second action: *Dehn & Lauderdale, for Dunderdale, Galloway & Co., Manchester.*

Solicitors for the defendants Porritt and Crowther: *Woodcock Ryland & Parker, for Woodcock & Sons, Haslingden.*

H. C. G.

ASTBURY J.

1924

April 30.

SHERWOOD *v.* TUCKER.

[1923. S. 5730.]

Landlord and Tenant—Lease—Option to purchase Freehold—Exercisable during the Term of the Lease—Express Extension of Lease—Option not mentioned—Implied Extension of Option.

A three years' lease or tenancy agreement terminating December 25, 1917, gave the tenant an option to purchase the freehold for 700*l.* " during the three years hereby provided for."

In June, 1917, the landlord and tenant signed an indorsement agreeing " that this lease be extended for three years expiring December 25, 1920."

In September, 1920, the parties signed a further indorsement agreeing " that this lease be extended for three years expiring December 25, 1923."

These indorsements, though duly stamped, were settled informally by the parties themselves without legal aid:—

Held, on the construction of these documents, that the parties intended to extend the lease or tenancy agreement with all its provisions, collateral or otherwise, and that the option was extended accordingly.

Dictum of Peterson J. in *Bradbury* v. *Grimble & Co.* [1920] 2 Ch. 548 124 L. T. 189 followed.

ORIGINATING SUMMONS.

By a tenancy agreement in writing dated October 29, 1914, and made between the defendant landlord of the one part and the plaintiff tenant of the other part, the landlord agreed to let and the tenant to take a certain house and premises for a term of three years from December 25, 1914, at 36*l.* per annum rent. The tenant agreed to pay the rent and keep the interior in repair, fair wear and tear excepted. The landlord agreed to keep the exterior in repair. It was further agreed that " the said tenant shall have the right to purchase the said house and premises during the three years hereby provided for, for the sum of 700*l.* sterling."

Some time in June, 1917, during the pendency of this tenancy agreement the parties added and signed the following indorsement: " We the undersigned hereby agree that this lease be extended for three years expiring December 25, 1920."

In September, 1920, during the extended tenancy the parties added and signed the following further indorsement: " We the undersigned hereby agree that this lease be extended for three years expiring December 25, 1923."

These indorsements, though duly stamped, were settled informally by the parties themselves without legal aid.

On September 17, 1923, during the extended tenancy the tenant's solicitors gave the landlord notice that the tenant desired to exercise the option of purchase and asked for an abstract of title.

On October 13, 1923, the landlord's solicitors replied that the option had long since expired.

On December 31, 1923, after further correspondence the tenant issued this summons under Order 54.A for a declaration that upon the true construction of the tenancy agreement of October 29, 1914, and the two indorsements thereon the tenant was on September 17, 1923, entitled to an option to purchase the freehold, and that this option was duly exercised by the notice of that date.

Evelyn Riviere for the tenant. The indorsements were clearly intended to extend the lease or tenancy agreement with all its terms as it stood, including the option which therefore became exercisable at any time during the extended term of nine years.

In *Bradbury* v. *Grimble & Co.* (1) a seven years' lease containing an option to purchase the reversion six months before the determination of the lease was extended for a further year. Peterson J. held that the option did not continue during a subsequent holding over tenancy from year to year, but was clearly of opinion that it continued during the eight years' extended tenancy.

Beebee for the landlord. In *Bradbury* v. *Grimble & Co.* (1) the option was exercised long after the determination of the extended tenancy. It was quite unnecessary to consider whether it could have been exercised during that extended tenancy, and Peterson J.'s remarks on that point are purely obiter. He only decided that the option did not attach to the subsequent year to year tenancy. Why? Because in his opinion an option to purchase the reversion was not one of the terms of the original tenancy, but a provision outside

(1) [1920] 2 Ch. 548; 124 L. T. 189.

ASTBURY J. 1924 SHERWOOD v. TUCKER.

the terms regulating the relations between the landlord and tenant as such. (1) It is difficult to justify the dictum that a mere extension of a lease simpliciter extends terms outside the landlord and tenant relationship, and the matter should be treated as res integra.

The present option was clearly limited in time—namely, "during the three years hereby provided for," i.e., by the tenancy agreement of 1914—so that *Rider* v. *Ford* (2) is inapplicable.

The landlord probably thought that this limited option would cease unless expressly renewed, and in that view was willing to grant another three years' extension twice over. But with the continuous rise of the value of property from 1917 and onwards it is highly improbable that by merely extending the lease he intended to extend a purely collateral option entirely to his own disadvantage.

Riviere in reply. The dictum in *Bradbury* v. *Grimble & Co.* (3) is very strong, as in February, 1910, when the lease was extended, it would have been too late to exercise the option under the original lease, which expired on May 31, 1910. Notwithstanding that fact Peterson J. was clearly of opinion that the option was extended up to six months before May 31, 1911. He drew a clear distinction between an express extension of a lease and a mere extension by holding over, and obviously thought that in the former case all the terms, collateral or otherwise, were extended.

ASTBURY J. [after stating the facts]. The short point is whether, by reason of the two indorsements extending the lease, the option was also extended so that the tenant could exercise it during the extended period. This is a short and interesting point of construction, on which there is apparently not much authority.

An option in a lease to purchase the reversion is not one of the terms of the tenancy. It is a collateral provision wholly outside the terms regulating the relations between the landlord

(1) [1920] 2 Ch. 551, 553. (2) [1923] 1 Ch. 541, 546.
(3) [1920] 2 Ch. 548; 124 L. T. 189.

and tenant as such, and if the tenant held over and paid rent after the expiration of the lease it is plain that a collateral option only exercisable during the term of the lease would not attach to and operate during the tenancy from year to year so created.

But the question here is entirely one of construction—namely, what did the parties mean by the two indorsements? The original option in the 1914 lease or tenancy agreement was exercisable "during the three years hereby provided for." The 1917 indorsement provides "that this lease be extended for three years expiring December 25, 1920," and the 1920 indorsement similarly extends the lease to December 25, 1923. The question is, what is the true construction of the words "this lease be extended"?

One view of course would be that it was a mere extension of the term and nothing more, the word "lease" without any context being probably referable to the term only. But I doubt very much whether that was really the meaning of the parties when they made these indorsements in their own language without legal aid, and I am inclined to think that by the expression "this lease" they meant the actual document with all its provisions intact. The indorsements read with the original lease and its provisions will bear that construction, and I think the parties really meant that the document with all its provisions, collateral or otherwise, should be carried on for the two additional terms of three years.

The parties might no doubt have provided that the term be extended and that the option should (or should not, as the case might be) continue during the extension. They have not done this, and I have to decide the meaning of the provision "that this lease be extended" for the successive periods. In my opinion, though I have some hesitation about it, the fair and true meaning is that the document—i.e., the lease or tenancy agreement with all its provisions, collateral or otherwise—should be extended for the successive periods.

The matter is not entirely free from authority. In *Bradbury* v. *Grimble & Co.* (1) a seven years' lease expiring

(1) [1920] 2 Ch. 548; 124 L. T. 189.

ASTBURY J. 1924 SHERWOOD v. TUCKER.

May 31, 1910, gave the lessee an option of purchase exercisable six months before the determination of the lease. By letters of February 7 and 9, 1910, "the lease was extended" for another twelve months from June 1, 1910, so that the extension terminated on May 31, 1911. The lessee then held over as tenant from year to year and purported to exercise the option in November, 1919. Peterson J. held that the option was purely collateral and did not attach to the holding over tenancy, which was all he had to decide. But, though not necessary to his decision, he pronounced a plain opinion or dictum that the option would have been exercisable at any time six months before May 31, 1911, when the extended lease expired. In other words he thought that the express extension of the lease extended the option.

The words of extension in that case were almost identical with the present words, and the dictum, quantum valeat, is clearly applicable.

For these reasons I hold that the express extension of the lease extended the option and that it was exercised in due time. The tenant is therefore entitled to the declaration he asks, and the landlord must pay the costs.

Solicitors: *Indermaur & Brown, for T. H. Morgan & Co., Colwyn Bay; Pearce & Sons, for Nunn & Co., Colwyn Bay.*

G. R. A.

In re HAWKINS.

WATTS *v.* NASH.

P. O. LAWRENCE J.

[1923. H. 2895.]

1924 March 27.

Donatio mortis causa—Validity—Bank Notes—Redelivery for safe Custody—Resumption of Possession by Donor.

Although it is essential to the creation of a valid donatio mortis causa that, after delivery of the subject matter of the gift, the donee should continue in possession of it until the death of the donor, the mere fact of the donor agreeing to take back the property for safe custody does not affect the validity of the previous gift.

ADJOURNED SUMMONS.

The defendant Margaret Leah Nash, who was a niece of the testator, Frederick Charles Hawkins, together with her husband, the defendant, James Mark Nash, had for many years before and down to the death of the testator kept house for him and generally attended to his needs.

The testator on his death-bed, on or about June 5, 1923, only a few days before his death drew a cheque on his bankers for 7000*l.* and handed it to James M. Nash with instructions to take it and cash it at his bankers in Tonbridge and bring back to him the sum mentioned in the cheque in Bank of England notes. James M. Nash carried out his instructions, and in the presence of his wife handed the notes to the testator. The testator having, at his own request, been handed some envelopes by his niece, himself wrote upon one of them "F. C. Hawkins, Niece, Margaret Leah nee Davis, Mrs. J. M. Nash, Wife of my friend for over 20 years. Not to be opened until after my death. F. C. Hawkins." And then upon another envelope the testator wrote: "Mr. James Mark Nash. My friend for over 20 years and husband of my niece Margaret Leah Davis. Not to be opened till after my death. Frederick Charles Hawkins." After having shown to his niece and her husband what he had written on the envelopes, the testator sent them both out of his room, and after an interval of a few minutes he called them back. Upon their return, the testator held in his hand an envelope, and the niece at the request and at the dictation

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of the testator wrote upon that envelope: "In case of my uncle's death Frederick Charles Hawkins, this envelope is to be opened by his niece Margaret Leah Nash, nee Davis, in the presence of my great friend, my husband James Mark Nash." The testator then placed that envelope inside a larger one and again, at his request and at his dictation, the niece wrote upon that envelope words almost identical with the words last quoted. The testator then wrote underneath those words on the larger envelope: "Just a present to two friends and relatives. I have lived and enjoyed their life for many years. God bless them. F. C. Hawkins." The testator then stuck it down and handed it to his niece, saying: "There you are Maggie, I am glad that is done, so if I don't get over this illness, I know that you both will never want, but mind you are not to tell any one about it, as I am doing this to save you both from paying death duties." The niece then said to her uncle: "Well, uncle, there are sure to be some questions asked about the money that was drawn out of the bank." The testator answered: "Surely I can do what I like with my own money, promise me to take care of it the same as I have done." The niece and her husband having both promised to do as he asked, the testator then took hold of their hands and kissed them. The next thing that happened was that the niece asked the testator if she should put the envelope in his deed box for safety against fire, and upon the testator assenting she took the key from a nail in the wall facing the testator's bed, unlocked the box and placed the envelope in the box, which she replaced under the testator's bed, and she hung up the key again on its nail. The large envelope in which the others were enclosed remained in the deed box until it was found there by the testator's executor after his death, and within it there was found the envelope which had been indorsed by the niece enclosing the two smaller envelopes, one of which was indorsed in favour of Mrs. Nash and was found to contain banknotes of the value of 5000*l.*, and the other was indorsed in favour of her husband and found to contain banknotes of the value of 2000*l.*

The testator died on June 14, 1923, having made his will on June 11, 1923. By his will he appointed the plaintiff to be the executor thereof, and after specifically bequeathing his furniture, household goods, utensils and clothes to his niece Mrs. Nash, he directed his residuary estate, which was worth about 7000*l.* exclusive of the banknotes, to be equally divided amongst his twelve nieces therein named, including his niece Mrs. Nash. In consequence of the discovery of the banknotes the executor took out an originating summons to have it determined whether the defendants Mrs. Nash and her husband were respectively entitled to the banknotes of 5000*l.* and 2000*l.* on the ground that those notes had respectively been the subject matter of a valid donatio mortis causa to those defendants.

A. C. Nesbitt for the plaintiff.

Cruickshank for Mrs. Nash and her husband. There was such a complete delivery of the notes as was sufficient to effectuate a valid donatio mortis causa in favour of each donee: *Miller* v. *Miller*. (1) The depositing of the notes in the testator's deed box for their safe keeping and the fact of their remaining so deposited until after his death did not amount to a resumption of dominion of the notes by the testator, or in any way prejudice or affect the previous gift of the notes: see dictum of Sargant J. in *In re Wasserberg*. (2) I do not deny that it is essential that the possession of the donee should continue until the donor's death, but here there was no break in the donees' possession. They never parted with their dominion of the notes. The possession of the donee in *Bunn* v. *Markham* (3) was possession coupled with dominion. In the case of *In re Taylor* (4) the placing of the deposit notes in the donor's cashbox for safe custody was held not to amount to resumption of possession by the donor. The facts in *Solicitor to the Treasury* v. *Lewis* (5) showed an intention on the part of the donor to reserve

(1) (1735) 3 P. Wms. 356.
(2) [1915] 1 Ch. 195, 202.
(3) (1816) 7 Taunt. 224, 231, 232.
(4) (1887) 56 L. J. (Ch.) 597.
(5) [1900] 2 Ch. 812.

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control or dominion of the deposit notes during her life, and are distinguishable from the present case. The whole point here is, as Rolfe B. put it to the jury in *Hills* v. *Hills* (1), whether the gift was intended as an absolute gift after the death of the donor or whether the donor intended to retain a control on the property during his or her life.

J. G. Joseph for one of the residuary legatees. The testator never parted with dominion of the notes. The direction that the envelopes should not be opened until after the testator's death was a direction intended to be addressed not to the donees but to his executor. The words "just a present to two friends and relatives" written on the large envelope showed that the testator did not intend that there should be an effective gift until after his death. His own deed box was the natural place for him to place the envelope with its contents, and the fact that it was placed and remained in his deed box and that the key was hanging on a nail opposite his bed negatived any right in the niece or her husband to remove the envelope from the box, and went to confirm the view that the testator never intended to and never did in fact part with his dominion over the notes.

Joseph Tanner for another residuary legatee. In order to effectuate a valid donatio mortis causa it is essential that the possession of the donee should continue up to the death of the donor: *Bunn* v. *Markham* (2), where Gibbs C.J. said that there was no case which decided that the donor might resume possession and the donatio continue. In the present case the donor resumed possession, with the result that, as there was no continuing possession by the donees, the gifts failed or were revoked.

F. L. C. Hodson and *Cecil Ince* for other residuary legatees.

P. O. LAWRENCE J. [after stating the facts as above mentioned and after holding that upon the testator's handing over to his niece the large envelope with the words "There you are Maggie," etc., there was an effectual donatio mortis causa of the banknotes in favour of his niece and her husband.

(1) (1841) 8 M. & W. 401. (2) 7 Taunt. 224, 231, 232.

continued as follows:] I now come to the incident which in my opinion creates the only real difficulty in the case—namely, the placing by the donee of the subject matter of the gift (after it had actually been delivered to her) in the deed box of the donor for safe custody. Did this act of the donee have the effect of terminating the gift?

No case has been cited which is precisely on all fours with the present case, but the opinion expressed by Sargant J. in *In re Wasserberg* (1) helps me very much in coming to a conclusion as to the true effect of what happened here. The learned judge there says: "If the testator had actually given the parcel to his wife and she had handed it back to him for the purpose of safe custody, that would probably have been enough" to bring the case within the first class of donationes mortis causa referred to by Lord Hardwicke in *Ward* v. *Turner*. (2)

It is contended, however, that this opinion is contrary to the well established rule that the possession of the donee must continue until the donor's death, and in particular is contrary to the decision in *Bunn* v. *Markham* (3), where Gibbs C.J. says: "All the cases agree that, if the donor resumes the possession it ends the gift. Lord Hardwicke expressly so holds in *Ward* v. *Turner* (2), where it suited the purpose of the counsel to argue that, if a donor, after making a complete delivery, receives back the article, the donation remains perfect. Lord Hardwicke immediately denied that proposition, and held that, if the possession of the donee do not continue, the gift is at an end."

In my judgment the word "possession," when used in that case and in the other cases on this subject, means possession coupled with dominion and does not cover the possession of a mere custodian for the donee. If this is the right view, the opinion of Sargant J. in *In re Wasserberg* (4) in no way conflicts with *Bunn* v. *Markham* (5), or with any of the other cases.

Of course it must depend upon the particular facts of each

(1) [1915] 1 Ch. 195, 202.
(2) (1752) 2 Ves. Sen. 431; 1 Dick. 170; 1 Wh. & T. 8th ed. p. 413.
(3) 7 Taunt. 224, 231, 232.
(4) [1915] 1 Ch. 195.
(5) 7 Taunt. 224.

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case whether the donor has resumed possession under such circumstances as will put an end to the gift.

In the present case the donee, after the gift had been perfected by actual delivery, asked for and obtained the permission of the donor to place the subject matter of the gift in his deed box for the sole purpose of safe custody and then acted upon the permission so obtained. Moreover the subject matter of the gift remained severed from the other contents of the box belonging to the donor by reason of its being enclosed in the indorsed envelope.

It is I think plain that the donee by acting as she did had no intention of parting with the dominion which she had acquired over the envelope and its contents, and that the donor by granting the permission had no intention of resuming dominion over the subject matter of his gift.

In these circumstances the fact that the donor after having completed his gift agreed, at the request of the donee, to take charge of the subject matter of the gift for her did not in my opinion operate to put an end to the gift.

For these reasons I have come to the conclusion that there was a valid continuing donatio mortis causa of the notes in question and that these notes do not form part of the testator's estate, but belong to Mr. and Mrs. Nash.

Solicitors : *Neve, Beck, Son & Co., for Thompson, Jevons & Hillman, Tonbridge ; Mowll & Mowll ; W. B. Fairbrother ; Woodcock Ryland & Parker ; James & Charles Dodd.*

H. C. H.

C. A.
1924
Jan. 31;
Feb. 1, 26.

In re LETTERS PATENT No. 139,207.

In re CARBONIT AKTIENGESELLSCHAFT.

[1922. C. 208.]

Patent—Costs—User by Government Department—Application for Remuneration—Rule that Crown neither pays nor receives Costs—Exceptions—Special Circumstances—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 29—*Patents and Designs Act*, 1919 (9 *& 10 Geo.* 5, *c.* 80), *s.* 8—*Rules of Supreme Court, Order* LIII.A, *r.* 9, *Order* LXV.

The applicants applied by originating summons under s. 29 of the Patents and Designs Act, 1907, as amended by s. 8 of the Patents and Designs Act, 1919, for an inquiry as to the remuneration proper to be paid to them for the user by a Government department of the patented invention of which they were the registered owners. In the course of the proceedings preliminary to hearing of the motion orders were made in which the litigation was treated, with the acquiescence of both litigants, as subject to the ordinary rule as to costs, and on two occasions orders were made requiring the applicants to give security for costs. After the hearing had proceeded for some time the applicants withdrew their claim in view of a prior trial of the invention found to have been made on behalf of the Government, which, by virtue of the proviso to s. 8 of the Patents and Designs Act, 1919, entitled the Government to make use of it thereafter without payment. On the question how the costs ought to be borne Sargant J. held that on an application under s. 8 of the Act of 1919 the Court had a discretion to award costs for or against the Government department, that the rule that the Crown neither paid nor received costs did not apply, and that there had been no agreement by the Crown to waive the rule. On appeal:—

Held, that under that part of the Patents and Designs Act, 1919, which authorized proceedings against a Government department, there was no express mention of costs; that the authority to deal with them was derived from the general jurisdiction of the Court; and that the Court had therefore no authority to depart from the common law rule that the Crown neither paid nor received costs, unless the special circumstances of the particular case justified it in so doing.

But *held* that having regard to the orders that had been made before the hearing of the motion, and particularly to the two orders for security for costs, the Court would infer an agreement between the parties that each of them should be treated as ordinary litigants as regarded liability for costs.

Decision of Sargant J. [1923] 2 Ch. 504 affirmed, but upon different grounds.

APPEAL from the decision of Sargant J. (1)

The Carbonit Aktiengesellschaft and Georg Schmidt were

(1) [1923] 2 Ch. 504.

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the registered legal owners of Letters Patent No. 139,207, granted to them for an invention of a "process and apparatus for unloading ammunition shells and like coverings filled with explosives in the condition of a solid aggregate."

They commenced proceedings by originating motion under the Patents and Designs Acts, 1907 and 1919, against the head of the Disposals Board claiming an inquiry as to the remuneration proper to be paid in respect of the use by His Majesty's Government of the said invention and payment of the amount found due upon such inquiry. Points of claim and defence were delivered and the respondent set up (amongst others) the defence that the Letters Patent were invalid; and he delivered particulars of objection alleging prior public user, at (amongst other places) the National Filling Factory, Chilwell, prior general knowledge, want of subject matter and lack of utility. At the hearing the respondent asked for and obtained leave to amend by alleging, as an additional ground of defence, that the invention had before the date of the patent been tried by or on behalf of the Government Departments using it so as to disentitle the applicants to remuneration for any user thereof by virtue of s. 8 of the Patents and Designs Act, 1919. (1)

(1) Sect. 8 provides: "For section twenty-nine of the principal Act [the Patents and Designs Act, 1907] the following section shall be substituted:—

"29.—(1.) A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject:

"Provided that any Government department may, by themselves or by such of their agents, contractors, or others as may be authorised in writing by them at any time after the application, make, use or exercise the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the Department and the patentee, or, in default of agreement, as may be settled in the manner hereinafter provided. And the terms of any agreement or licence concluded between the inventor or patentee and any person other than a Government department, shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown:

"Provided further that, where an invention which is the subject of any patent has, before the date of the patent, been duly recorded in a document by, or tried by or on behalf of, any Government department, (such invention not having been communicated directly or indirectly by the applicant for the patent or the patentee), any Government department, or such of their

In the course of the proceedings preliminary to the hearing of the motion the following interlocutory orders were made :—

Jan. 20, 1922. Order made by Russell J. upon the return of the originating summons directing the matter to be placed in the list of actions to be heard with witnesses. Directions given for pleadings and finally that the costs of the motion should be costs in the action.

May 4, 1922. Order made by the Master upon the application of the respondents to the motion (the Disposals Board) directing that the applicants (the Carbonit Company and Georg Schmidt) should on or before June 2, 1922, lodge in Court a sum of 200*l.* as security for the costs of the respondents.

June 15, 1922. Upon the applicants' summons for an order that they should be given inspection of certain plant at the Royal Arsenal, Woolwich, the Master refused the order and awarded the costs of the summons to the respondents in any event.

Nov. 22, 1922. Upon the application of the respondents for leave to amend the particulars of objections, an order was made by the Master in chambers that the costs of and consequential upon such amendment should be the applicants' (the Carbonit Company and Georg Schmidt's) costs in any event.

Dec. 20, 1922. Order made by the Master in chambers directing the applicants (the Carbonit Company and Georg Schmidt) to lodge in Court a further sum of 600*l.* as security for the costs of the respondents.

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agents, contractors, or others, as may be authorised in writing by them, may make, use and exercise the invention so recorded or tried for the service of the Crown, free of any royalty or other payment to the patentee, notwithstanding the existence of the patent. . . . .

" (2.) In the case of any dispute as to the making, use or exercise of an invention under this section, or the terms therefor, or as to the existence or scope of any record or trial as aforesaid, the matter shall be referred to the Court for decision, who shall have power to refer the whole matter or any question or issue of fact arising thereon to be tried before a special or official referee or an arbitrator upon such terms as it may direct, ..."

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Jan. 31, 1923. Upon the subsequent application of the respondents for further leave to amend the particulars of objections the Master gave the necessary leave to amend asked and directed that the costs of and consequential upon such amendments should be the applicants' (the Carbonit Company and Georg Schmidt's) costs in any event.

After the hearing had continued for five days, the applicants withdrew their claim for remuneration in view of the evidence tendered by the respondent proving a prior experimental trial of the invention at the National Filling Factory, Chilwell.

The question then arose whether the prima facie rule that the Crown neither paid nor received costs applied to these proceedings or whether the costs were within the discretion of the Court, and it is on this question alone that the proceedings call for report.

Sargant J. held that on an application by a patentee under s. 8 of the Patents and Designs Act, 1919, claiming remuneration for the user of the patented invention by a Government department the Court had a discretion to award costs for or against the Government department, and that the rule that the Crown neither received nor paid costs did not apply. He accordingly directed that the respondents should have the general costs of the originating motion, and that the applicants should have the costs, if any, of the amendment made in the course of the hearing.

The applicants appealed. The appeal was heard on January 31 and February 1, 1924.

Trevor Watson for the appellants. The general rule that the Crown neither pays nor receives costs is not disputed. The question is whether there were such special circumstances in this case as to take it out of the general rule. A petition of right is a statutory exception to the general rule. Sargant J., it is submitted, was entirely wrong in treating the Arbitration Act, 1889, as giving the Court jurisdiction to deal with costs in cases in which the Crown was concerned. That Act contains an express provision in s. 23 that no order

of the Court is to affect the law as to costs payable by the Crown.

[*Whitehead K.C.* I accept that. The Act was never mentioned by me to the Court.]

The only remaining reasons for the judgment are those founded on Order LIII.A, r. 9, and Order LXV.

The proposition of law which the appellants seek to establish is that the general rule as to costs in cases in which the Crown is concerned applies unless the statute in question, either by express words or by necessary implication, provides that the Crown shall pay or receive costs. There is no reported case in which the general rule has been overridden except by express words in a statute. If therefore either Order LIII.A, r. 9, or Order LXV. on its true construction involves that the Crown shall be liable to pay or entitled to receive costs it is, it is submitted, ultra vires.

In *Rex* v. *Archbishop of Canterbury* (1), where the Crown was a party to the argument of a rule for the prerogative writ of mandamus, it was held that the Court had no jurisdiction to give costs either for or against the Crown.

In *Johnson* v. *The King* (2) Lord Macnaghten recognized the general rule. He said that their Lordships were of opinion that in dealing with costs in cases between the Crown and a subject, the Privy Council ought to adhere to the practice of the House of Lords, and that in future the rule should be that the Crown neither paid nor received costs unless the case was governed by some local statute, or there were exceptional circumstances justifying a departure from the ordinary rule.

In *Moore* v. *Smith* (3) it was held on appeal under 20 & 21 Vict. c. 43 against a conviction of the appellant by two justices on an information laid before them by the respondent, an officer of the Excise, on behalf of the Crown, for an offence under the Excise Acts, that the Court, on confirming the conviction, had jurisdiction under s. 6 to award costs to the respondent, as the statute included cases in which the

(1) [1902] 2 K. B. 503, 571. (2) [1904] A. C. 817, 825.
(3) (1859) 1 E. & E. 597. 600.

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Crown was directly or indirectly a party. In that case the Crown, having been brought within the provisions of the Act, remained within them for all purposes. The case represents high water mark as regards liability of the Crown for costs.

Thomas v. *Pritchard* (1) really followed *Moore* v. *Smith* (2), and again was a very exceptional case. The Court there held that there was a sufficient implication to be found in the Acts in question that the Crown was to be bound as to costs. As regards that decision it is stated in Robertson on Civil Proceedings by and against the Crown, p. 621, that "The decision was based on s. 53 of the [Summary Jurisdiction] Act of 1879, which provides that the Summary Jurisdiction Acts shall apply to such proceedings, and the principle of *Moore* v. *Smith* (2) was followed. The judgment no doubt rested upon stronger grounds than that in *Moore* v. *Smith* (2), but it seems to the author that both decisions may deserve reconsideration. They seem to be somewhat of an infringement on the principles that the Crown is not bound by statutory provisions unless there is a clear intention that it should be bound, and that the Crown does not receive or pay costs apart from statutory provisions in that behalf." Those two cases must therefore, it is submitted, be regarded as open to comment, and as laying down no general principle.

The Patents and Designs Act, 1919, in giving a new jurisdiction to the High Court in cases in which the Crown may be a party, does not enable it to award costs in favour of the Crown. Rule 9 of Order LIII.A provides that in all proceedings before the Court under the Act of 1907 costs of and incident thereto are to be in the discretion of the Court, and it is contended that if that Act and the rule are taken together the Crown is thereby made liable to pay or entitled to receive costs. The answer to that contention is that the rules are made by the Rule Committee, who derive their power under the Judicature Act, 1875, and cannot therefore exceed the powers given by that Act. There is no ground for the

(1) [1903] 1 K. B. 209. (2) 1 E. & E. 597, 600.

suggestion that there is any difference between Order LIII.A and Order LXV. as regards the power of the Court to award costs for or against the Crown.

As to implication, the procedure under the Act of 1919 is new and was not in contemplation at the time the rules were made. To hold that they apply to the Crown would be to carry the doctrine of implication further than it has ever been carried in any reported case. It is submitted, therefore, that no sufficient ground has been shown for departing from the general rule.

Whitehead K.C., *Dighton Pollock* and *Courtney Terrell* for the Crown. It is necessary to consider more closely the provisions of the Act of 1919. Sect. 8 of that Act, which takes the place of s. 29 of the Act of 1907, introduced a fundamental alteration in the law. It mentions the Crown and contemplates the possibility of its owning patents. Sect. 12 inserts a provision after s. 73 of the Act of 1907 (s. 73A, sub-s. 1) empowering the Comptroller in any proceedings before him under the Act to award to any party such costs as he may consider reasonable, and to direct how and by what parties they are to be paid. Sect. 30 of the Act of 1907 provides that assignments may be made to Government departments of certain inventions. The Crown therefore may become owner of patents, and as such owner may oppose the grant of other patents and the matter may be brought before the Court. If therefore the Comptroller has power to award costs in such a case, it follows that the Court would have a similar power on an appeal from him. The Crown is, therefore, bound to rely upon the authority of *Moore* v. *Smith* (1) and *Thomas* v. *Pritchard*. (2) There is no express authority to be found in the books which fixes the Crown with liability for costs in cases relating to patents, although cases have come before the Court in which costs have been given against the Crown; but in those cases the question of costs was not argued. In *Rex* v. *Comptroller-General of Patents* (3) costs were asked for by the Crown and

(1) 1 E. & E. 597.
(2) [1903] 1 K. B. 209.
(3) (1922) 39 R. P. C. 335; [1922] W. N. 176.

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given. In *In re Bremer's Patent* (1) an order was made by Parker J. that there should be no costs of the appeal except those of the Attorney-General; but the question as to costs was not argued, and the Attorney-General was not made a party. That is the only case in which costs have in fact been awarded to a law officer.

[POLLOCK M.R. referred to *The Leda.* (2)]

Costs are not awarded in cases of extension of patents: there is no special provision as to these. Two reasons have been assigned for the existence of the general rule that the Crown neither pays nor receives costs—namely, (1.) the difficulty of enforcing payment of costs against the Crown, and (2.) that as it is the Crown's prerogative not to pay costs to a subject so it is beneath its dignity to receive them. The rule is exemplified in *Rex* v. *Miles* (3), where the Attorney-General sought the revocation of a patent, but was refused costs.

[POLLOCK M.R. So far as that case goes it would appear to support Mr. Trevor Watson's contention that the general rule applies.]

It was contended on behalf of the appellants that if Order LIII.A and Order LXV. purported to give the Court jurisdiction to award costs for or against the Crown they were ultra vires. The foundation of the power to make rules is to be found in s. 17 of the Judicature Act, 1875, and that power was extended by the Statute Law Revision and Civil Procedure Act, 1881, s. 6. With those provisions upon the statute book it was decided in *In re Mills' Estate* (4) that the effect of the Judicature Acts and the Rules was not to give any new jurisdiction to award costs, but only to regulate the mode in which costs were to be dealt with in cases where the Court antecedently had jurisdiction, either original or statutory, to award costs. Then came the Judicature Act, 1890, which by s. 5 provided: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions

(1) (1909) 26 R. P. C. 449, 466.
(2) (1863) Br. & L. 19.
(3) (1797) 7 T. R. 367.
(4) (1886) 34 Ch. D. 24.

of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

[POLLOCK M.R. Incidentally that statute would not bind the Crown.]

No doubt it is not so provided in express terms. The effect of the Act was considered in *In re Fisher*. (1)

The old rule has been applied many times since the Judicature Acts. Its existence was admitted in *Johnson* v. *The King* (2), but it was there stated that there might be exceptional cases which would justify a departure from it. See also *Postmaster-General* v. *National Telephone Co.* (3) in the note at the end of the report. The discussion as to costs at the end of the case is not reported.

Before 1883 a petition of right would not have lain in respect of the user by an officer of the Crown of an invention protected by a patent: *Feather* v. *The Queen*. (4) That however was altered by the Patents, Designs and Trade Marks Act, 1883. Sect. 8 of the Act of 1919 has now provided a new form of procedure analogous to that of a petition of right, and although it does not expressly provide that the Court shall have power to award costs, the Court has, it is submitted, power to do so: *Rex* v. *Archbishop of Canterbury*. (5)

[POLLOCK M.R. referred to *Lord Advocate* v. *Lord Dunglas*. (6)]

In *Mews* v. *The Queen* (7) the Attorney-General, on behalf of the Crown, was ordered to pay to the appellants the costs in the Courts below and of the appeal to the House of Lords.

As to r. 9 of Order LIII.A, although that rule in terms gives the Court power to award costs, it is not contended on

(1) [1894] 1 Ch. 450.
(2) [1904] A. C. 817.
(3) [1909] A. C. 269.
(4) (1865) 6 B. & S. 257, 297.
(5) [1902] 2 K. B. 503, 572.
(6) (1842) 9 Cl. & F. 173.
(7) (1882) 8 App. Cas. 339.

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behalf of the Crown that it can give jurisdiction if that jurisdiction did not previously exist. The rule can have no basis other than the Judicature Acts under which it is made.

There are three instances in which costs for and against the Crown have been specifically dealt with by Act of Parliament —namely, the Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 11; the Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 5; and the Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50), s. 26, sub-s. 1.

There does not appear to be any direct authority for third class of exceptions to the general rule mentioned by Lord Macnaghten in *Johnson* v. *The King* (1)—namely: "Exceptional cases where justice seemed to require that the Crown should pay costs, or where the Crown was not unwilling to be treated as an ordinary litigant." The nearest case is *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos.* (2)

There are many reported cases where in exceptional circumstances costs have been given against the Crown: *Rolet* v. *The Queen* (3); *George* v. *The Queen* (4); *Casanova* v. *The Queen.* (5) The rule is a flexible one, though there may be some doubt as to the limits of its flexibility. It is not necessary that there should be an actual agreement between the parties to exclude its operation. In Chancery the rule is confined to cases where there is a fund to be administered: *Attorney-General* v. *Earl of Ashburnham.* (6)

As to the last point on which Sargant J. decided against the Crown—namely, on the special circumstances of the case—it is submitted, that having regard to the various orders that have been made in the course of the proceedings, and particularly to the two orders obtained by the Crown for security for costs which would be meaningless if the rule applied, the Crown must be taken to have agreed to place itself in the position of an ordinary litigant. The common law rule can be abrogated by the Crown if it elects to be treated as an ordinary litigant, and here it is submitted it has done so, and

(1) [1904] A. C. 817, 824.
(2) [1891] A. C. 460, 471.
(3) (1866) L. R. 1 P. C. 198.
(4) (1866) L. R. 1 P. C. 389.
(5) (1866) Ibid. 268.
(6) (1823) 1 S. & S. 394.

all parties have acted on that footing. The order therefore awarding costs to the Crown was right.

Trevor Watson in reply. The questions at issue have now been reduced to two—(1.) the effect of the interlocutory orders that have been made, and (2.) the possibility of costs being given against the Crown in proceedings before the Comptroller. As to the first it is contended that where on the evidence it appears that the Crown was not unwilling to be treated as an ordinary litigant costs may be given for or against the Crown. That contention, it is submitted, proceeds upon a misapprehension of *Johnson* v. *The King*. (1) Lord Macnaghten was not there laying down the practice of the House of Lords but that of the Privy Council. The Crown can no doubt waive its prerogative as to costs by agreement with the other side, and it is here said that there was an agreement between the parties that the Crown should be treated as an ordinary litigant. The orders are put against the appellants as evidence of such an agreement, but the Court is not entitled to say that they constitute the only evidence. These are not the proper proceedings in which the question of such an agreement can be raised. If the Crown has a special agreement as to costs it should raise it by action. The agreement, if it be an agreement, is that the general rule as to costs should be set aside. It is impossible to say on the present facts that there was any agreement such as is suggested. The case here is not put as one of estoppel but as one in which the rule has been ousted by agreement. The orders relied on are not, it is submitted, such as the Court can infer from them an agreement to waive the rule.

On the second point it is true that the Act of 1919 gives power to the Comptroller to award costs and to a Government department to own patents, but the statute does not contemplate proceedings being taken by the Crown. The mere fact that the Crown may own patents does not necessarily involve that it is going to oppose the grant of other patents. The law officers of the Crown have special functions to perform under the Patent Acts for the purpose of preserving

(1) [1904] A. C. 817.

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the purity of the register, and it cannot therefore be assumed that they are always acting on behalf of the Crown. It is submitted, therefore, that there are no special circumstances in this case which prevent the application of the general rule.

Cur. adv. vult.

Feb. 26. POLLOCK M.R. read the following judgment: In this case the applicants applied by an originating motion under s. 29 of the Patents and Designs Act, 1907, as amended by s. 8 of the Patents and Designs Act, 1919, claiming an inquiry as to the remuneration proper to be paid to them in respect of the use by His Majesty's Government of an alleged invention of which they were the registered legal owners. The particular department of His Majesty's Government concerned was the Disposals Board, whose head was made respondent to the motion. The defence set up, amongst others, by the respondent was that the Letters Patent were invalid; and particulars of objections were delivered alleging prior public user, prior general knowledge, want of subject matter and lack of utility, and later an additional ground that the invention had before the date of the patent been tried by or on behalf of the Government departments using it, so as to disentitle the applicants to remuneration for any user thereof. The motion was heard before Sargant J., and after the hearing had continued for some days, the applicants withdrew their claim. The question of the costs of the proceedings then arose. It was argued on behalf of the applicants that the rule that the Crown neither pays nor receives costs was applicable. Sargant J., for the reasons given in his judgment, decided that the above rule did not apply and that he had power to deal with the costs. He thereupon exercised that power by ordering the applicants to pay to the respondent the general costs of the originating motion. From that order this appeal is brought; and it is argued on behalf of the appellants—the applicants—that the rule stated above applied to the proceedings and that Sargant J. had no power to make the order appealed from.

Certain interlocutory orders were made in the course of the proceedings preliminary to the hearing, and it is important to state them. The nature of the orders made is as follows: [His Lordship referred to the orders above set out and continued :]

Sargant J. stated the well-known rule of the common law that the Crown neither pays nor receives costs, and he cited as an illustration of, and as an authority for the proposition, *Rex* v. *Archbishop of Canterbury* (1), where it was decided that where the Crown is a party to the argument of a rule for a prerogative writ of mandamus, the Court has no jurisdiction to give costs either to, or against the Crown.

The rule is stated in Blackstone's Commentaries, vol. iii., p. 400, and the reason given for it is that the Crown is not mentioned in the Acts which originally gave costs, and that as it is the Crown's prerogative not to pay costs to a subject, so it is beneath its dignity to receive them. Further cases illustrating the rule were cited to us, such as *Rex* v. *Miles* (2), in scire facias at the suit of the Crown : *Lord Advocate* v. *Lord Dunglas* (3), in which the House of Lords, after argument of the Attorney-General and the Lord Advocate, held that the Crown, whether represented by the Attorney-General for England or the Lord Advocate for Scotland, is not liable for costs, and on this ground, that recognizances to answer the costs of an appeal to the House of Lords could not be required from an officer of the Crown. Another illustration of the application of the same rule in the Court of Admiralty is to be found in *The Leda* (4), and there are numerous others collected in Robertson's Civil Proceedings by and against the Crown.

Sargant J. in his judgment refers to the exceptions to the general rule, which I will deal with later, and founded his judgment upon the principle that where a statute expressly or impliedly mentions the Crown, or Government department, and provides for or contemplates costs, then the general rule ceases to apply and the Crown or the department is in the

(1) [1902] 2 K. B. 503.
(2) 7 T. R. 367.
(3) 9 Cl. & F. 173.
(4) Br. & L. 19.

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same position in this respect as an ordinary litigant; and he cites as authorities for this proposition *Moore* v. *Smith* (1) and *Thomas* v. *Pritchard*. (2) *Moore* v. *Smith* (1) was explained by Lord Alverstone in *Thomas* v. *Pritchard* (2), where he points out that the decision was based upon the principle that the words of the statute there in question covered and bound the Crown, so that it was intended that costs should be awarded either to, or against, the Crown. That same principle was applied in *Thomas* v. *Pritchard*. (2)

I cannot find in the relevant statutes any sufficient authority for applying that principle to the present case. Sargant J. felt authorized to deal with the costs because of the power over costs given under Order LIII.A and Order LXV. of the Rules of the Supreme Court, and the discretion as to them, introduced by the Schedule to the Arbitration Act, 1889. He observes that it would be anomalous—as indeed it would—if a judge had no discretion over costs in a matter which might have been referred to an arbitrator exercising the powers given by the Arbitration Act, including the power over costs. Unfortunately the attention of Sargant J. was not called to s. 23 of the Arbitration Act, which excludes the Crown from the effect of its provisions, nor was *In re Mills' Estate* (3) cited to him, which decides that in cases where provision is made by law, or statute, as to the incidence of costs, that is not altered or interfered with by the Judicature Acts and rules. The same jurisdiction and powers that were in existence remain as before, and Orders LIII.A and LXV. are made and derive their authority from the Judicature Acts.

Furthermore, the Crown is not bound by the Judicature Act, 1890, which, it was suggested, by s. 5 added a new power to the Courts—not in existence when *In re Mills' Estate* (3) was decided: see *In re Fisher*. (4) No added power or discretion over costs in cases where the Crown is a party can be adduced from that source. Where a minister, or department

(1) 1 E. & E. 597.
(2) [1903] 1 K. B. 209, 213.
(3) 34 Ch. D. 24.
(4) [1894] 1 Ch. 450.

of the Crown, is made liable for costs, this is done by express words, of which illustrations are to be found in the Admiralty Lands and Works Act, 1864, and most recently in the Ministry of Transport Act, 1919, s. 26, sub-s. 1. For these reasons I am not able to agree with the grounds on which Sargant J. based his judgment.

But as Sargant J. stated in his judgment, there are various heads of exception from the rule above quoted and illustrated. These exceptions are tabulated in the well-known judgment of Lord Macnaghten in *Johnson* v. *The King* (1) and include: "Exceptional cases where justice seemed to require that the Crown should pay costs, or where the Crown was not unwilling to be treated as an ordinary litigant." Cases where this principle has been applied are to be found in *Rolet* v. *The Queen* (2); *Casanova* v. *The Queen* (3); and *George* v. *The Queen.* (4) The present appears in my judgment to be one of such cases.

By successive orders, made over a period of twelve months, the litigation was treated, with the acquiescence of both litigants, as subject to the ordinary rule. On two occasions orders were made requiring the applicants to give security for costs; orders which could have been successfully resisted if the rule now relied upon had been raised as an objection to them. It would have been only necessary to cite *Lord Advocate* v. *Lord Dunglas* (5) to show that where the rule that the Crown neither pays nor receives costs applies, there no security for costs can be required. See also *Shedden* v. *Attorney-General.* (6)

This course was not adopted. Why not? The conclusion to my mind is clear. The applicants accepted and acted upon the willingness of the Crown to be treated as an ordinary litigant. They had sufficient confidence in their case and in their prospect of success to be not unwilling by submission to, and compliance with, the orders made, to arm themselves with proof that the rule was not to be applied

(1) [1904] A. C. 817, 824.
(2) L. R. 1 P. C. 198.
(3) Ibid. 268.
(4) L. R. 1 P. C. 389.
(5) 9 Cl. & F. 173.
(6) (1867) 36 L. J. (P. & M.) 132.

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to these proceedings. Had the order of the learned judge been that the applicants were to be paid their costs by the Crown, any attempt on the part of the Crown to set up its immunity from costs would have been resisted by the applicants and successfully; perhaps, too, with some indignation that such a claim should be made after what had occurred in the course of the interlocutory proceedings, and a protest against bad faith.

In my judgment, therefore, the applicants are not entitled to raise this question and must submit to the order made by the learned judge—an order fully justified by the applicants' own conduct throughout the proceedings.

Perhaps I may be allowed to add my agreement with Lord Alverstone in the expression of his hope that the rule may be dealt with by legislation, and my expectation that it will be so in view of the appointment by Lord Birkenhead, when Lord Chancellor, of a committee to consider Crown procedure which is now at work. It is a rule which, though it has the appearance of giving an immunity to the Crown as against the subject, not seldom, as in this case, is called into practice to the advantage of the subject, and works as often to the disadvantage of those who are in fact interested under the name of the Crown, that is the taxpayers. It is they who have to provide the means to pay for a successful defence to an unsubstantiated claim, the costs of which should in justice, and would if there were no such rule, fall upon the unsuccessful litigant. The appeal must be dismissed with costs.

WARRINGTON L.J. read the following judgment: The proceeding in which this appeal arises was an application by patentees under s. 29 of the Patents and Designs Act, 1907, as amended by s. 8 of the Patents and Designs Act, 1919, for the determination by the Court of a dispute between the patentees and the Disposals Board, a Government department, as to the remuneration to be allowed to the patentees for the user by the Crown of the patented invention, the Crown denying the validity of the patent. There was accordingly a litigation

between the Crown and a subject to which prima facie the old common law rule that in such cases the Crown neither pays nor receives costs would apply. The patent was in the result held to be invalid, and the learned judge (Sargant J.), being of opinion that the general rule did not apply to the particular case, dismissed the application with costs to be paid by the applicants, who appeal to this Court.

Two grounds were relied upon by the Crown for the exclusion in this case of the admitted general rule: First, a general ground applicable to all such applications under the Act, and secondly, a special ground applicable to the particular case.

As to the first ground it was said that according to the true construction of the Act the Crown was by necessary implication brought thereby under the general authority of the Court as to costs, and was therefore not entitled to rely on its exemption in general from liability for costs, and the exemption of the subject being merely the consequence of that of the Crown could no longer be insisted on. It was on this ground that the learned judge arrived at his conclusion.

The second ground was that on the facts the Court ought to infer an agreement that the Crown should in this case be treated as an ordinary litigant and therefore both liable to pay and entitled to receive costs. This contention was rejected by the learned judge, who held that there was no such agreement.

I will consider first the more general question arising on the construction of the Act. There is authority for the proposition that where an Act of Parliament provides for the taking before a Court of proceedings to which it appears by the Act itself the Crown may be party and also empowers the Court to order by whom the costs are to be paid, such a statute would bind the Crown and the Court would be entitled to award costs either to or against the Crown: *Moore* v. *Smith* (1) and *Thomas* v. *Pritchard*. (2)

But in the present case, though the Act contemplates and

(1) 1 E. & E. 597. (2) [1903] 1 K. B. 209.

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in fact authorizes proceedings to which the Crown would be a party, it makes no reference to the costs of such proceedings, but leaves them to be dealt with by the Court under its general jurisdiction. The distinction between this case and such cases as *Moore* v. *Smith* (1) is pointed out by Lord Alverstone C.J. in *Thomas* v. *Pritchard.* (2) The Judicature Acts and the Rules thereunder are the enactments from which the power to award costs is derived. Under those Acts and Rules proceedings may be taken to which the Crown is a party, but it could not, in my opinion, be contended with success that in such cases the Court has power to award costs to be paid by or to the Crown notwithstanding the general rule above referred to. So to hold would be in effect to hold that the Judicature Acts and Rules have had the effect of destroying the old rule altogether so far as proceedings before the Supreme Court of Judicature are concerned. Such a result has not been even suggested. The learned judge bases his judgment on the assumption that in referring the matter to arbitration as authorized by the Act the Court might direct the arbitrator to deal with the costs and that the Arbitration Act, 1889, itself authorizes him so to do, and he says it would be anomalous that the arbitrator should have power to award costs against the Crown and the Court should not. But the learned judge has unfortunately forgotten that the Arbitration Act, by s. 23, provides that nothing in the Act shall affect the law as to costs payable by the Crown, and there is therefore no basis for his assumption.

In the present case there is not in the Act authorizing the proceedings any express mention of costs. The authority to deal with them is derived from the general jurisdiction of the Courts, and that being so, the Court has not, in my opinion, authority to depart from the common law rule unless the special circumstances of the particular case justify it in so doing.

This brings me to the consideration of the second of the two grounds put forward by the Crown. It is said that in this case there is a sufficient special circumstance in the

(1) 1 E. & E. 597. (2) [1903] 1 K. B. 213.

alleged agreement between the parties that the Crown should be treated as an ordinary litigant.

There is, I think, no objection in law to this contention on the part of the Crown. The rule, so far as it prevents orders for costs against the Crown, is derived from the Royal Prerogative, and there is nothing to prevent the Crown from waiving its rights, with the consent, I suppose, of its opponents, if it desires to prevent the application of the rule so far as it is in their favour, or without their consent if their rights are not prejudiced.

What has happened in the present case is that in the course of interlocutory proceedings orders have been made in some cases that the costs should be costs in the action and in others that the costs (in two instances) should be the costs of the applicants in any event—namely, should be paid by the Crown, and in another that the costs should be the respondents' in any event. The learned judge was of opinion that from these orders he could not infer a special bargain such as would displace the general rule. I am not sure that I should come to the same conclusion, especially having regard to the three orders giving costs to one or other of the parties in any event. But any doubt I may have is removed by further facts not apparently mentioned to the judge. Two of the applicants were out of the jurisdiction and the Crown applied for security for costs. Now if the general rule were to be applied there could be no ground for this application inasmuch as there would be no costs to be secured. No objection however was raised by the applicants and accordingly an order was made for security, followed by another increasing the amount, and in each case the security ordered was duly given.

The Crown in effect by asserting that the applicants were not to have the benefit of the rule waived or offered to waive its own correlative immunity, and the applicants by not objecting to the orders and by giving security accepted the position. It seems to me that this constituted a complete agreement that each party should be treated as an ordinary litigant as regards liability for costs. It is said that we ought

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to draw no such inference, because the parties may have assumed that they would be so treated without an agreement. The reason actuating the parties seems to me to be immaterial; they have in my view so acted that neither the Crown on the one hand nor the applicants on the other can assert an immunity from costs.

As to the case of *Johnson* v. *The King* (1) that case is not in strictness an authority in these Courts, and it only professes to lay down a rule of practice for the Judicial Committee of the Privy Council. It does however recognize the general rule and the exceptions to it occasioned by statute. I hesitate to express an opinion whether in these Courts any exceptional circumstance other than such an agreement as is found in the present case would be sufficient, and I prefer to reserve my judgment on this point.

On the whole I am of opinion, though for different reasons, that the order appealed from was correct and the appeal should be dismissed with costs.

ATKIN L.J. I should not have added any words of my own if it had not been that though we are confirming the order of the learned judge we are doing so upon different grounds. Indeed we are differing from the learned judge on both the points upon which he decided the case, and therefore I will merely add this. There can be no question that the Crown by right of prerogative is not liable to pay costs, unless there is a statutory provision that it is to be so liable.

The statutory provisions in this case are contained originally in the Act of 1907, s. 29, which provides that "A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject," and then it provides that the Government department is to have the right of user of an invention for the services of the Crown upon terms that may either be agreed, or in default of agreement shall be settled by the Treasury. Now to my mind it is beyond controversy that that provision does not expose the Crown to the obligation to pay costs. It merely creates a right against

(1) [1904] A. C. 817.

the Crown, and that right must be enforced in any other way in which rights can be enforced against the Crown, but without any express provision that the Crown is to be liable to pay costs.

Now that provision has been amended by the Act of 1919, which substitutes another and a different section for s. 29 in the Act of 1907, and that Act provides by s. 8, sub-s. 2, that the Government department is to have the right of making, using and exercising an invention, and in case there is any dispute as to the making, using and exercising of the invention, or the terms thereof, the matter shall be referred to the Court, and the Court may refer the matter to a special or an Official Referee upon such terms as it may direct; so that for the first time the Court or some arbitrator appointed by the Court may determine the compensation to the inventor for the making, using or exercising of the invention by the Crown.

Now it seems to me that in the same way there is in this case no provision that the Crown is in any way to forfeit or to have its prerogative limited in respect of costs. It is true that the Court may refer the matter upon such terms as it may direct, but it appears to me that that provision clearly would not in itself give a right to the Court to make a term limiting the prerogative; and with regard to the provisions of the Arbitration Act, 1889, upon which the learned judge relied—as to which there has been an unfortunate mistake—those provisions quite clearly maintain the prerogative of the Crown. Under those circumstances, therefore, it appears to me that there is no special statutory provision exposing the Crown to costs.

The only other way in which the argument could be put is this. It is said that under the Act of 1907, s. 92, sub-s. 2, provided that "a petition may be referred or presented to the Court, the appeal shall, subject to and in accordance with rules of the Supreme Court, be made and the petition referred or presented to such judge of the High Court as the Lord Chancellor may select for the purpose," and that inasmuch as there was a rule-making power which would

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apply to the petition in this particular case, the statute by implication gave the rule-making authority power to limit the prerogative. Then the rules are referred to—namely, the rules made after the passing of the Act of 1907. Those rules, it is to be observed, were made partly under the express rule-making authority given in the Act of 1907, and obviously also partly under the general rule-making authority under the Judicature Act. But the position appears to me to be precisely the same as the power given to the rule-making authority under the Judicature Act, and it never has been suggested that the Rule Committee had power to limit the prerogative of the Crown in respect of the costs of proceedings, and I think it never has undertaken to do so, and it appears to me that r. 9 of Order LIII.A cannot be deemed to be a statutory restriction of the prerogative of the Crown as to costs. If that is so, the general rule must prevail, and if the right of the Crown is to be taken away in any particular matter it must be taken away expressly by statute.

The other matter, therefore, remains to be considered, and it is said, and I think rightly said, that though the Crown has the prerogative right not to pay costs, it may agree in any particular case to pay them. I think that probably it makes little difference whether the submission of the Crown to pay costs is put on an agreement, or whether it is put upon waiver. Substantially it amounts to the same thing—namely, that the Crown or the Crown's agents by their action, and acting within their authority, represent to the other side that for the purpose of the particular case the Crown will undertake to be liable to pay costs, and if that is accepted I think it is only accepted upon the correlative obligation of the other side, that they on their part will submit to pay the costs to the Crown.

Now do the circumstances in this case give rise to such an inference of waiver, or to an inference of an agreement? To my mind they quite plainly do. Both parties have taken orders that the costs of interlocutory proceedings should be payable in any event, orders which would be quite unmeaning if in fact both parties were relying on the position which was

the true common law position that neither party were liable to pay costs. But then in addition to that the Crown asked for, and the applicants submitted to an order for security for costs. That seems to me to be unmeaning except upon the footing that the costs of the unsuccessful party would be paid; that the costs of the Crown would be paid out of that security if in fact the applicants failed; and the asking for such an order, and the submission to it by the applicants, seem to me quite plainly to give rise to the inference that each party represented to the other that, for the purposes of this case, at any rate, they would be liable, and would undertake to be liable, to pay or to receive costs, as the case might be.

If the alternative position had arisen, and the Crown had failed, and the applicants had asked for costs, it appears to me that it would have been a piece of really bad faith on the part of the Crown's advisers to turn round and say: "Though we asked for costs on the footing that you were liable to pay costs, and also that therefore we were liable to pay costs, now we rely upon the prerogative." I think the conclusive answer would have been: "No, you have waived that right by making that request and inducing us to alter our position by bringing money into Court." For these reasons it appears to me, with great respect to the judgment of the learned judge, that in this case justice requires, by reason of the conduct of the parties, that the parties should be treated as having made themselves liable to a proper order for costs. The particular order made by the learned judge is not impugned, and therefore I think the result is that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Mills, Lockyer, Church & Evill.*
Solicitor for respondents: *Solicitor to the Treasury.*

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Bankruptcy—Bankruptcy Notice—Setting aside—Deed of Arrangement—Provision in Deed that it should not be registered—Letters signed by Creditors assenting to Deed and agreeing to take no Proceedings in respect of Debts or to set Deed aside—Subsequent Issue of Bankruptcy Notice by One of assenting Creditors—Assent to void Deed—Estoppel—Deeds of Arrangement Act, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 2.

On June 11, 1921, the appellant company recovered judgment against the debtor for a certain sum and costs. On April 18, 1922, the debtor executed a document in the form of a memorandum of agreement by which he assigned his property to trustees for the benefit of his creditors. The agreement provided (inter alia) that it should not be registered either as a composition or deed of arrangement or otherwise and contained a schedule of creditors and their debts. At the date of the agreement there were five bankruptcy petitions pending against the debtor by creditors other than the appellant company. As a result of negotiations between the debtor and the five creditors and in consideration of his entering into the agreement of April 18, 1922, the five creditors agreed to the dismissal of their petitions and signed letters dated April 17, 1922, which were all in the same form, and contained a statement that it was understood that it was not intended to register the agreement as a deed of arrangement, by which they respectively agreed that so long as the debtor complied with the terms of the agreement of April 18, 1922, they would not bring any action against him in respect of their scheduled debts or attempt to set aside the agreement. On July 18, 1922, the appellant company signed a letter of assent in the same terms, which was also dated April 17, 1922, and agreed to hand it over to the debtor on receiving from him a promissory note or bill of exchange of a third party for 300*l.* This condition the debtor performed. The letter was not however handed over to the debtor owing to the refusal by him to pay to the appellant company an agreed sum for costs, a term which the Court held formed no part of the original bargain. The appellant company subsequently issued a bankruptcy notice against the debtor founded on its judgment debt. The registrar set the bankruptcy notice aside on the ground that the appellant company was bound by the agreement contained in the letter signed by it. On appeal:—

Held, that the agreement of April 18, 1922, being a deed of arrangement, was void for want of registration under the Deeds of Arrangement Act, 1914, and that the letter of assent, being an assent to a void instrument, was also itself void.

Held, also, that as the debtor and all the creditors who assented to the agreement knew from the terms of the instrument itself and from the statement contained in the letters signed by them that the agreement was void, and there was no representation that the agreement was valid, there was no question of estoppel, and the appellant company was not estopped from issuing the bankruptcy notice.

In re Bagley [1911] 1 K. B. 317; *In re Lee* [1920] 2 K. B. 200 followed. *Smith* v. *Baker* (1873) L. R. 8 C. P. 350; *Roe* v. *Mutual Loan Fund, Ld.* (1887) 19 Q. B. D. 347 distinguished.

Dictum of Horridge J. in *In re Wilson* [1916] 1 K. B. 382, that in the case of a void deed there may be an estoppel which prevents a party to the deed from setting up its invalidity, dissented from.

Decision of registrar reversed.

Appeal from an order of Mr. Registrar Francke setting aside a bankruptcy notice and declaring that no act of bankruptcy had been committed in respect of such notice.

The following statement of facts is taken from the judgment of the Master of the Rolls: "The judgment on which the bankruptcy notice was issued is dated June 11, 1921. On April 18, 1922, an agreement was entered into between the debtor and two trustees, under which the debtor agreed to set aside a portion of his income as indicated in the schedule to the agreement as from July 1, 1922, and transfer certain assets also specified in another schedule. The trustees were to stand possessed of these assets and income and pay (1.) the costs of the agreement; (2.) the costs of the trustees; (3.) the claims which were entitled to priority; (4.) to make an allowance to the debtor; and (5.) out of the balance to pay off the debts by such dividends and at such times as the trustees in their absolute discretion should think fit.

"The facts in reference to this particular creditor and as to the debt are set out in the affidavit made by the debtor, and are not controverted. The agreement contains a full schedule of his creditors as at the date thereof, that is, April 18, 1922. At the date of the agreement there were five petitions pending against the debtor by creditors other than the present creditor, L. Shaw (1914), Ld., and as the result of the negotiations between the debtor and those five petitioning creditors and in consideration of his entering into the agreement with the trustees of April 18, 1922, the five petitioning creditors consented to the dismissal of their respective petitions, and each of the five petitioning creditors signed a letter of agreement dated April 17, 1922, whereby they respectively agreed that so long as the debtor complied with

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the terms of the agreement of April 18, 1922, they would not bring any action against him in respect of their scheduled debts, nor would they attempt to set aside the agreement.

"The five petitions were ultimately dismissed about July 26, 1922. By July, 1922, the debtor had approached the other creditors whose names appear, and each of them had signed a letter of agreement, or signified their willingness to do so, if and when the debtor required it. Then, during the months of May and June, the debtor was in communication with the present creditor, L. Shaw (1914), Ld., with the view of obtaining the signature of that company to the letter of agreement. The debtor says he saw Shaffer, the managing director, personally on one or two occasions, and discussed the position with him. Shaffer at first refused to sign, and afterwards stated he would be willing to do so, provided the debtor would procure and hand over to him a bill of exchange for 300*l.*, being part of the indebtedness of the debtor to L. Shaw (1914), Ld., and that bill of exchange or promissory note was to be given by a named and identified person. The debtor procured the bill from this person, and on or about July 18, 1922, called upon Shaffer at his office, handed to him the bill, and then he, in the presence of the debtor, signed the letter of agreement as assenting to the deed. I will come to the actual terms of that in a moment. Shaffer then said he would pass this letter of assent or agreement to his solicitors to be handed over by him to the debtor's solicitors in exchange for a sum to be paid in respect of costs which had been incurred in the course of the negotiations and correspondence relating to the matter, costs incurred that is, by L. Shaw (1914), Ld. The letter of assent was so sent and the amount of costs which were ultimately agreed upon was a sum of three guineas. Those costs were, in fact, not paid, and they were not paid under circumstances which are set out in the correspondence; but before I deal with that, a letter was signed on this day in July, the letter of assent. Shaffer signed it as managing director for L. Shaw (1914), Ld., and it bears date April 17, 1922. That is the same date that the five petitioning creditors gave their assent to the deed, but, in

fact, from the affidavit we know that it was not signed till July 18, 1922, or thereabouts. It is in these terms: 'In consideration of the execution by you of an agreement to be dated the 18th day of April, 1922, and made between yourself of the one part, and Albert Henry Partridge, of 3, Warwick Court, W.C., and Hugh Clayton Armstrong, of 39, Gt. James St., Bedford Row, W.C., of the other part (a print whereof has, for purposes of identification, been initialled by the said Hugh Clayton Armstrong) and which, I understand, you do not intend to register as a deed of arrangement, I hereby agree that, so long as you comply with the terms of the said agreement, I will not, nor will my personal representatives, bring or prosecute any action or legal proceedings whatever against you, or against your estate or effects in respect of my scheduled debt, nor will I or they attempt to set aside such agreement.'

"To finish what happened about costs, it stands in this way: In the autumn of 1922, while the letter of assent was in the hands of the solicitors of L. Shaw (1914), Ld., an attempt was made by Messrs. Lloyd & Armstrong, acting for the debtor, to secure possession of that letter of assent. At some time after the letter had been sent to the solicitors of L. Shaw (1914), Ld., an interview took place and the solicitors insisted that they would not hand over that agreement unless this sum of three guineas for costs was paid. The debtor's solicitors were unable to comply with that request and declined to pay the three guineas with the ultimate result that the letter of assent remained in the possession of the solicitors of L. Shaw (1914), Ld., until October, 1923, and then an ultimate second offer was made, or another offer was made to get possession of the letter, and the three guineas was, in fact, tendered."

On January 4, 1924, L. Shaw (1914), Ld., issued a bankruptcy notice against the debtor founded on its judgment debt. The registrar set the bankruptcy notice aside on the ground that the company was bound by its letter of assent.

L. Shaw (1914), Ld., appealed. The appeal was heard on March 4 and 5, 1924.

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Clayton K.C. and *H. G. Robertson* for the appellant company. There is no power in the Court to go behind a judgment on an application of the debtor to set aside a bankruptcy notice: *In re Easton.* (1)

[ATKIN L.J. A debtor is entitled to have the question decided whether he has committed an act of bankruptcy, as it affects his status.]

You may go behind the judgment in order to show that the debt is not due, but you do not thereby affect the judgment: *In re Easton* (1); *In re Cole.* (2)

The point of substance in this case is that there was no concluded agreement by the appellant not to enforce the judgment so long as the terms of the deed were complied with. There was an offer which was withdrawn before acceptance. The fact that the letter was retained by the appellant company's solicitors shows that there never was a completed agreement. It was too late for the debtor to accept an offer made twelve months previously. If, however, there was an agreement then it was to a deed of arrangement which was void under the Deeds of Arrangement Act, 1914, for want of registration: s. 1, sub-s. 1 (*a*).

[*Merriman K.C.* I am not going to contest that the deed is not a deed of arrangement. My point is estoppel.]

The assent to a deed of arrangement may be testified either by the execution of the deed itself or by a separate document: s. 3, sub-s. 3. We rely on the non-registration of the deed making it absolutely void: s. 2. If the letters signed by the creditors not to take proceedings can be enforced the effect will be to render the Act of no force. It is submitted there was no consideration for the letter signed by the appellant company. It is part of the deed which is avoided by the statute. The letter of assent can have no greater force than if its provisions had been embodied in the deed itself. The letter was not a contract subject to a condition, because it was never handed over to the debtor. It was only an offer. If it was a conditional contract the condition was not performed within a reasonable time.

(1) (1893) 10 Morrell, 111. (2) [1898] 1 Q. B. 290.

Merriman K.C. and *Tindale Davis* for the respondent. This is one of those cases in which a particular creditor is estopped from saying that an arrangement to which he has assented is void. The appellant company is bound by the agreement to which it has assented.

[ATKIN L.J. What do you say is the arrangement to which the appellant company has assented ?]

It has held itself out to the trustees of the deed and to other creditors as having assented to the terms of the letter and has allowed five of the creditors to withdraw their bankruptcy petitions.

[POLLOCK M.R. You have to establish that there is something that estops the appellant company from taking proceedings.]

The respondent has to establish that on the day that the appellant issued his bankruptcy notice he was not in a position to issue execution under the judgment. It is submitted that the registrar decided absolutely rightly that there had been an assent which precluded the appellant company from issuing a bankruptcy notice. The fallacy of the argument for the appellant company is that it entirely overlooks the promissory note which is still retained by the appellant company.

Then can this particular creditor say that the whole of this arrangement was invalid ? It is admitted that the letter signed by the appellant company is void as a deed of arrangement. As to estoppel, the circumstances may be such that a party (including the particular petitioning creditor) may say that he is not bound by the deed of arrangement because it is void for want of registration. But in a case where the petitioning creditor, who is himself a party to the deed, is the attacking party he is, it is submitted, estopped from denying its validity.

[WARRINGTON L.J. That is a very wide proposition, because it would render the deed valid, all the creditors having assented to it.]

It is submitted that the appellant company has by its conduct prevented itself from relying upon the invalidity of

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the deed: *In re Wilson.* (1) In *In re Bagley* (2) it was held that there was no estoppel because no one knew of the defect in the deed. Here every one knew that the deed was a nullity. The appellant company here has by its conduct represented that it was bound by the deed and is now estopped from denying that it is so bound. It is submitted that every word of the reasoning of the judgments of Horridge and Rowlatt JJ. in *In re Wilson* (3) applies to this case.

In re Lee (4) is distinguishable from the present case. The question there did not arise until after the estate had been put into bankruptcy by a creditor who was not a party to the deed. The whole judgment in that case must be regarded as proceeding on that footing.

[Warrington L.J. How do you distinguish the facts in *In re Bagley* (2) from those in the present case?]

The creditors in that case did not know the fact that the bill of sale was invalid. It was the case of a concealed defect. What the appellant company has here done in effect is to agree to be bound by an invalid deed.

[Pollock M.R. referred to *Smith* v. *Baker.* (5)]

That case was dealt with in *Roe* v. *Mutual Loan Fund, Ld.* (6)

Public policy which requires publicity in the case of bills of sale applies as much in the case of deeds of arrangement.

No one would here deny that but for the Deeds of Arrangement Act, 1914, the appellant company by doing what it has done would be estopped from proceeding under its judgment. It is submitted that although the deed is a nullity the appellant company has assented to it and is thereby estopped from saying that it is a nullity. In *O. Comitti* v. *Maher* (7), where both the plaintiffs and the defendant held out an invalid bill of sale to be valid against the creditors of the defendant, it was held that as between the plaintiffs and defendant the bill was valid.

In re Ashwell (8) shows that in cases of estoppel the trustee

(1) [1916] 1 K. B. 382, 392.
(2) [1911] 1 K. B. 317.
(3) [1916] 1 K. B. 382.
(4) [1920] 2 K. B. 200.
(5) L. R. 8 C. P. 350.
(6) 19 Q. B. D. 347.
(7) (1905) 94 L. T. 158.
(8) [1912] 1 K. B. 390.

has a higher and better title than the debtor. In that case it was held that the trustee in bankruptcy was not estopped by the debtor's misrepresentations from enforcing the repayment of certain money.

Clayton K.C. in reply. The statement of Horridge J. in *In re Wilson* (1) as to the effect of the appellant's conduct in that case was merely a dictum and was doubted by Rowlatt J. in the same case. See also *In re Lee.* (2)

[ATKIN L.J. The only case that troubles me is *Roe* v. *Mutual Loan Fund, Ld.* (3)]

In order to establish an estoppel it must be shown (1.) that the representation is a representation of fact; (2.) that it is a representation of an existing fact and not of a future intention; (3.) that it is believed by the person to whom it is made; and (4.) that damage accrues from it.

[*Merriman K.C.* referred to *Burkinshaw* v. *Nicolls.* (4)]

As to the question of public policy in *Jackman* v. *Mitchell* (5) a bond to secure to one creditor the deficiency of a composition not communicated to the other creditors was ordered to be delivered up, though to particeps criminis, on the ground that in these cases, which proceeded upon grounds of public policy, the relief was given on account, not of the individual, but of the public.

Jorden v. *Money* (6) shows the necessity of the representation being one of an existing fact. In *Maddison* v. *Alderson* (7) Lord Selborne L.C. in summing up the whole matter said: "I have always understood it to have been decided in *Jorden* v. *Money* (8) that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises de futuro, which, if binding at all, must be binding as contracts." Those two cases lay down the limits of estoppel by representation.

(1) [1916] 1 K. B. 382, 392.
(2) [1920] 2 K. B. 200, 212.
(3) 19 Q. B. D. 347.
(4) (1878) 3 App. Cas. 1004, 1025, 1026, 1027.
(5) (1807) 13 Ves. 581, 587.
(6) (1854) 5 H. L. C. 185, 214.
(7) (1883) 8 App. Cas. 467, 473.
(8) 5 H. L. C. 185.

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Burkinshaw v. *Nicolls* (1) is really in the appellant company's favour.

[POLLOCK M.R. That case has really nothing to do with the present.]

Roe v. *Mutual Loan Fund, Ld.* (2), was founded on *Smith* v. *Baker* (3), and was a case of wrongful conversion. It was there held a plaintiff can treat the defendant who commits the wrongful conversion as a trespasser or as his agent, but that after he has made his election he cannot change it.

It is submitted that the whole transaction between the appellant company and the respondent was nugatory.

POLLOCK M.R. This is an appeal by a judgment creditor from an order made by the registrar setting aside a bankruptcy notice and declaring that no act of bankruptcy under s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914, has been committed. It is important to observe at the outset that what is in question in the appeal is whether a bankruptcy notice could be validly issued and served on the debtor. The question whether after non-compliance with the notice a creditor is entitled to have a receiving order made under s. 2 of the Act is not before us.

The facts are as follows: [His Lordship stated the facts as above set forth and referring to the tender of the three guineas continued:] It was said that the tender was made in good time and that the condition, if condition it was, which was imposed could have been fulfilled. First of all it is said by the appellant that there was no concluded agreement on his part to assent to the deed of April 18, 1922. He claims that inasmuch as the three guineas costs were never paid and inasmuch as possession of the letter of assent was never handed over to the debtor or his solicitors, the terms and conditions on which he assented, or agreed to assent to the deed were not fulfilled.

We have come to the conclusion that that claim is ill-founded. It appears from the evidence before us, and in

(1) 3 App. Cas. 1004, 1014. (2) 19 Q. B. D. 347.
(3) L. R. 8 C. P. 350.

our judgment it is clear, that the real terms on which this letter of assent was to be given were that the promissory note or bill of exchange for 300*l.* should be given to the appellant company, and that if that promissory note or bill of exchange was given, then the appellant company would be ready to fall into line with the other creditors, and to give its assent to the deed of April 18, 1922. The question, therefore, of exactly what took place with regard to this matter of the demand for three guineas costs is of small importance. It is sufficient, in dealing with it, to say that that seems to have been a term imposed subsequently to the assent of the appellant to an agreement to give the letter of assent: it was no part of the original terms; the only condition on which the assent of the creditor was withheld was until he received the promissory note or bill of exchange in question, and when the bill of exchange or promissory note, whichever it was, was given, the terms were fulfilled upon which he had said that he would then give the letter of assent. There was, therefore, so far as that point is concerned, an assent on the part of this creditor to the terms of the deed of April 18, 1922. How far does that assent prevent the appellant from issuing the bankruptcy notice? It is admitted that the agreement was made, that the deed of April 18, 1922, is a deed of arrangement within the meaning of the Deeds of Arrangement Act, 1914, and that in consequence of its not having been registered in accordance with that Act, it is of no validity. Therefore it is not binding upon the persons who have assented to it, because by that Act a deed of arrangement is void unless it is registered in accordance with the terms of that Act. Hence, although one may talk of the agreement of April 18, 1922, and the agreement of assent to it, it is an agreement which is void, and an assent which is a nullity, and therefore it is not binding upon the appellant.

The next point, and the real point, which is taken is this: that as the creditor did assent in the terms which I have read to the deed of April 18, 1922, even though the deed itself is void, yet the creditor is estopped from saying

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that the concluded agreement is bad in law and cannot be relied upon by the debtor as an answer to the bankruptcy notice, or rather, as a shield against the creditor taking any steps which he had expressly agreed not to take by the terms of his assent. It is said that inasmuch as he signed the letter embodying these words: "I will not so long as you comply with the terms of the agreement nor will my personal representatives bring or prosecute any action or legal proceedings whatever against you or against your estate or effects in respect of my scheduled debt, nor will I or they attempt to set aside such agreement," he is debarred from now attempting to issue the bankruptcy notice, and however void the agreement may be, that estoppel ought to be sufficient in the hands of the debtor to place an effective obstacle against the issue of the bankruptcy notice. The doctrine of estoppel has on many occasions been relied upon under circumstances not dissimilar from those in the present case.

In *In re Bagley* (1) a creditor recovered judgment against a debtor for a certain sum and ultimately that creditor himself became bankrupt. The trustee in the bankruptcy of that creditor had assented to a deed of arrangement entered into between the first debtor and his creditors a few months previously, and therefore he had himself assented to the giving of time and to the arrangements made with the first debtor. It was said that having done that, he could not now that he was trustee for the creditor in the bankruptcy of the creditor issue a bankruptcy petition in respect of that very debt as regards which he had himself assented to a scheme for payment; but it was held that he was not estopped from so doing by the course which he had taken, because the original arrangement was void under the Deeds of Arrangement Act, 1887, which was the Act then in force. Cozens-Hardy M.R. said (2): "The first objection taken by the debtor was that Chapman [the trustee in bankruptcy] had assented to the deed of arrangement and therefore was not in a position to present a bankruptcy petition, nor was his assignee. The answer to that is that the deed of

(1) [1911] 1 K. B. 317. (2) [1911] 1 K. B. 323.

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arrangement is a nullity, and for this reason. The Deeds of Arrangement Act, 1887, provides that a deed of arrangement shall be void unless registered under the Act"—and it was not registered and hence the assent was to something which was a nullity and inasmuch as the assent was to a nullity, there was no impediment to the trustee in bankruptcy proceeding to the issue of the petition. Furthermore, in the Deeds of Arrangement Act now in operation, the Act of 1914, by s. 24, sub-s. 2, the position is as follows: "Where such a deed of arrangement as aforesaid has become void by virtue of this Act or any enactment repealed by this Act, the fact that a creditor has assented to the deed shall not disentitle him to present a bankruptcy petition founded on the execution of the deed of arrangement as an act of bankruptcy."

I have pointed out at the commencement of my judgment that what we are dealing with here is the issue of a bankruptcy notice, and not the question of whether or not upon a petition a receiving order should be made. It may be said that the sub-section which I have read, s. 24, sub-s. 2, and *In re Bagley* (1) both apply to the case of the presentation of a petition, but the reason is, I think, by analogy, binding upon us when we are considering whether or not there is what is called an estoppel preventing this creditor, who is the appellant, from issuing the bankruptcy notice. The other case which was relied upon most strongly was *In re Wilson* (2) and in particular the judgment of Horridge J. Rowlatt J. does not go so far as to assent to a general proposition that where a deed is bad, there can be estoppel preventing a party to the deed from setting up the avoidance of the deed, and I think it is right to say that Horridge J. in that case founded his judgment most particularly upon the facts. That case cannot, having regard to the divergence of view of the two judges, be held to be an authority justifying so wide a proposition as that where a person has been a party to a deed he is estopped thereafter from taking a course inconsistent with his assent to that deed,

(1) [1911] 1 K. B. 317. (2) [1916] 1 K. B. 382.

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even when that deed is found to be void. I think Horridge J. himself in the later case of *In re Lee* (1) so narrows his judgment in the previous case. He says (2): "It was also contended on behalf of the applicant that the debtor would have been estopped from saying that the money was not to be applied in favour of the creditors. The only right to apply it in favour of the creditors, and the only direction given was by the void deed; and until the money had been paid over, and the payment had been ratified by the debtor, in my view he would have been entitled at any moment to ask for it back. It is not like *In re Wilson* (3), or *Roe* v. *Mutual Loan Fund, Ld.* (4) I held in *In re Wilson* (3) and the Court of Appeal decided in *Roe* v. *Mutual Loan Fund, Ld.* (4), that a person who had relied upon an invalid deed, and had set it up so as to obtain the benefit of it, could not afterwards go back upon it and allege that it was invalid." Certainly Horridge J. does not in *In re Lee* (5) confirm the proposition for which *In re Wilson* (3) was cited to us by Mr. Merriman.

Let me say a word as to what the doctrine is that is invoked. It is said to be estoppel, and for that purpose one must find that there has been some representation made by one person to another with the intention and with the result of inducing the person to whom the representation was made to act on the faith of that representation and to alter his position to his detriment. Are those features present in this case? The appellant, as we have held, agreed to an assent to a void deed, but the assent becomes, equally with the deed, a nullity. What representation has he made? It is clear from the very terms of the letter that all parties had in mind the Deeds of Arrangement Act, that it was by a common consent, that the agreement was not registered, with the consequent result, as everybody must have known, that it would be void, that each and all of the creditors and every one else was therefore conscious that they

(1) [1920] 2 K. B. 200.
(2) [1920] 2 K. B. 211, 212.
(3) [1916] 1 K. B. 382.
(4) 19 Q. B. D. 347.
(5) [1920] 2 K. B. 200, 211, 212.

were joining in a course of conduct which had no valid foundation in law. What representation was made by that assent? As Mr. Clayton has pointed out it is quite clear from *Jorden* v. *Money* (1) and *Maddison* v. *Alderson* (2) that the representation must be of some existing fact, and not a statement of a promise, something to be done in the future. It is difficult to see that the letter signed by those creditors was other than this—namely, an intended promise that in the future neither the creditor nor his personal representative would prosecute any action or legal proceedings. If that is to be valid, it must be valid as a contract and cannot stand, based as it is upon a void deed, as a representation of some existing fact for the purpose of giving rise to an estoppel. It seems to me, therefore, that there is really no estoppel which prevents or impedes the path of the creditor in issuing the bankruptcy notice. Two other cases have been referred to. One was *Roe* v. *Mutual Loan Fund, Ld.* (3), and the other was *Smith* v. *Baker*. (4) Both of those cases refer to courses taken by a party before the Court in subsequent proceedings initiated by the party on a basis contrary to that on which the first proceedings had been taken before the Court, and in both of those cases the judgments appear to have proceeded upon the ground that the Court would not allow a party to obtain some advantage or to implement a contract or take proceedings based upon one point of view and subsequently come again to the Court in order to reap an advantage from the Court based upon an entirely inconsistent attitude.

I do not think those cases cover the present, and so far as *Roe* v. *Mutual Loan Fund, Ld.* (3), goes, I have the same doubt which Atkin L.J. expressed quite clearly in the course of the argument whether the principle was properly applied to the circumstances of the case. The principle upon which it relies is one which can be well understood, and it is that where there has been some definite election on the part of a party to secure advantage he cannot afterwards reprobate that position and ask for an entirely different relief based

(1) 5 H. L. C. 185.
(2) 8 App. Cas. 467.
(3) 19 Q. B. D. 347.
(4) L. R. 8 C. P. 350.

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upon an attitude contrary to his original one. Exactly what the facts were which justified that principle it is not quite easy to ascertain.

I have now dealt with the cases, and for the reasons which I have given it does not seem to me that it is possible to apply the doctrine of estoppel. The doctrine, after all, is a matter of evidence. It is really a claim that there is some evidence which in the course of litigation is sufficient to impede or to destroy the rights which the other party is setting up. In the present case, the creditor is not bound by his assent to the deed of April 18, 1922; his promise that he would not take proceedings in the future is really not within the doctrine of estoppel, and if that be so, one does not see how it can be said there is any impediment to his taking a course which by the letter of assent he said he would not take. That letter, not being binding upon him in law, and the doctrine of estoppel not applying, I think the appeal must be allowed with costs.

Warrington L.J. I am of the same opinion. The appellant company is a judgment creditor of the debtor under an admittedly valid judgment. It has, in accordance with the provisions of the Bankruptcy Act, issued a bankruptcy notice against the debtor; the registrar has set aside that notice, and it is from his decision that the creditor appeals to this Court. The registrar set aside that notice on the ground that the right of the judgment creditor to issue a notice founded on the judgment was precluded by his assent to a so-called deed of arrangement, and that by the terms of its assent it was precluded from taking any proceedings against the debtor or against his estate. The answer, and as I hope to show, the conclusive answer, to the grounds on which the notice was set aside is this, that the deed of arrangement was a void deed and that the assent of the creditors to that deed of arrangement was also a void transaction. It was an assent to something which at the outside imposed a moral obligation upon the creditor.

I do not propose to go through the facts of the case; they

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have been fully stated by the Master of the Rolls; but I must just state very shortly the effect of the deed of arrangement and the terms of the creditor's assent. The deed took the form of a memorandum of agreement dated April 18, 1922, and it is made between the debtor and the trustees. It contains this remarkable statement, that it is made by the debtor with the trustees "to the intent that these presents shall not be registered either as a composition or deed of arrangement or otherwise." The deed vests in the trustees certain property of the debtor and contains provisions under which the trustees were to distribute a certain proportion of that property amongst the creditors. The creditors are all the creditors at the date of the execution of the agreement. The names and the amounts of their debts respectively are set out in the schedule. All those creditors, including the present appellant company, signed letters of assent to the deed. The letter signed by the appellant company, and, I understand, that those signed by the other creditors were in substantially the same form, was as follows: [His Lordship read the letter and continued:] The Deeds of Arrangement Act was passed to carry out the well-known policy of the Legislature in all matters relating to bankruptcy, that such proceedings shall be public, and that no private arrangement shall be made between an insolvent debtor and his creditors. It provides in terms that every deed of arrangement between the debtor and his creditors shall be void unless it is registered under the Act. It is admitted that the present deed is a deed of arrangement. It is, therefore, quite plainly void. The creditors have assented to it, but those assents are in exactly the same position as if the deed had itself contained the provisions contained in the letters of assent, and the deed had been executed by the creditors. In that case, it is abundantly plain that if the deed was void, the whole of the deed, including the assents by the creditors, was void also, and it cannot, in my opinion, make any difference that the creditors assent by separate documents, such as those in the present case; indeed, to come to the contrary conclusion would be to hold that the Court has power, by

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its decision, to render ineffective the legislative provisions imposing publicity upon such arrangements as the present, and rendering such arrangements void, unless they are so made publicly. It seems to me, therefore, that so far, there is no ground whatever for saying that by reason of the assent to this void deed, the appellant company is disabled from relying upon its judgment and taking such proceedings as it may think fit.

So far as the authorities are concerned, there is one which seems to me to be precisely in point, and a much stronger case really, than the present one. I allude to *In re Bagley*. (1) In that case the material facts can be very shortly stated: one, Gibson, was a judgment creditor of Bagley. Bagley became bankrupt. The judgment debt which Gibson had recovered became vested in Gibson's trustee in bankruptcy. The trustee in bankruptcy assented to a deed of arrangement which had been made between Bagley and his creditors. Subsequently, he issued a notice, and on the debtor not complying with it, he presented a petition in bankruptcy. It was there contended that notwithstanding his assent to the deed of arrangement, it was void, not because, as in this case, there was deliberate non-registration, but because one of the conditions of registration had inadvertently not been complied with. It was held that the deed being void, the assent of the trustee in bankruptcy of Gibson did not preclude him from issuing the bankruptcy notice. That case seems to me precisely in point. It is a decision of the Court of Appeal and therefore binding upon us.

It is said that there are two other cases, both of them in the Divisional Court, on which a different conclusion may be founded. One of these is *In re Wilson* (2); but when the judgment of Horridge J. in that case is looked at carefully it will be found that the learned judge did not enunciate any principle or act on any view inconsistent with the decision of the Court of Appeal in *In re Bagley*. (1) What he there did was to find that the creditor had been guilty (guilty, perhaps, is not quite the right word to use) of conduct

(1) [1911] 1 K. B. 317. (2) [1916] 1 K. B. 382.

in connection with the matter which had precluded him from setting up the invalidity of the deed, though he agreed that if there had been nothing but the assent to the deed, the creditor would not have been precluded. Rowlatt J., the other member of the Court, did not see fit to take the same view, and Horridge J. himself in a subsequent case of *In re Lee* (1) points out the distinction between *In re Wilson* (2) and the case then before him, in which he expressed a different conclusion from that which he had expressed in *In re Wilson*. (2) It seems to me, therefore, that there is no answer to the appellant company's claim to be at liberty to issue the bankruptcy notice.

It is said that, though by mere assent to the deed, the appellant company may not be precluded from issuing the bankruptcy notice, he may yet be precluded on the application of the doctrine of estoppel. In the first place, I can see no ground whatever for the application of that doctrine. Every one knew, the debtor, the trustee, every creditor who assented to the deed, and this creditor, that the deed was void. No one made any representation, either by conduct or otherwise, that the deed was a valid deed—every one knew it was not. That any estoppel could be founded on the signing of an assent under those circumstances seems to me to be an impossible conclusion. But an argument was founded upon the special position of this particular creditor (the appellant company), and it is necessary to consider it. The appellant company made it a term of its assent that it should receive a promissory note for a portion of its debt signed by a third person, and it did receive it. How that can affect the question as between the debtor and his creditor under the deed of arrangement, I cannot see. It may be—and as to that, I express no opinion,—that some kind of agreement was effected by the signing of this assent as between the debtor and this particular creditor, which might result in damages or have some other effect, but how it can invalidate a judgment not otherwise invalidated by what has taken place, I cannot

(1) [1920] 2 K. B. 200. (2) [1916] 1 K. B. 382.

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understand. It seems to me, therefore, that on this ground—namely, that the assent is void, and that there is no estoppel binding this creditor—the judgment of the learned registrar must be set aside.

Before I part finally with the question of estoppel I may say this, that it seems to me that the question—if it ever arises for decision—whether the doctrine of estoppel can be made use of to render valid a transaction which the Legislature on grounds of public policy has said shall be invalid, is one that will require very careful consideration.

As to the other point made by Mr. Clayton, it only becomes material if the appellant company was in some way bound by the letter of assent. I have nothing to add to what has been said by the Master of the Rolls. The result is that, in my opinion, the appeal succeeds, and the order of the registrar must be set aside with costs.

Atkin L.J. I agree; and inasmuch as we differ from the order made by the learned registrar, and questions have been raised in argument which appear to be of some general importance, I will proceed to state my own reasons for coming to the conclusion that the order of the learned registrar must be set aside.

This was an application made by a debtor to set aside a bankruptcy notice, and his allegation was that the creditor who had served the bankruptcy notice had entered into a contract not to enforce the judgment. If he could have proved such a contract, I think he would have been entitled to have the bankruptcy notice set aside. The first answer that was made by the creditor was that he had made no such contract, that the negotiations were only in the position of an offer unaccepted, and, secondly, he said that, even if he had made such a contract, it was subject to a condition as to the payment of his solicitors' costs, a small sum of three guineas, and that that condition had not been performed, and, therefore, the contract was no longer operative. Upon that, to my mind, the creditor fails. I think that there was a promise not to enforce the judgment, and that it was not subject to a

condition, but that if it had been subject to a condition, then the condition was fulfilled.

Then the creditor makes a further, and much more formidable, answer, that the contract was void under the Deeds of Arrangement Act, for the contract was in itself only an assent to a deed of arrangement, and that that deed had not been registered pursuant to the Act, 1914. I do not propose to read the documents or to state the facts, because it is admitted by counsel for the debtor that the agreement contained in that letter was in fact void under the Deeds of Arrangement Act as being an assent to a deed of arrangement which was not registered. Therefore it is unnecessary to consider the possibility of it being alleged that that agreement given for an independent consideration—namely, the giving of a bill of exchange by a third party for a substantial sum payable at twelve months—amounted to an agreement by the creditor not to sue independently altogether of the deed of arrangement. That point is not made before us, and it is admitted that subject to the further question, which I must deal with, the question of estoppel, that agreement would in fact be void. Therefore the only question we have to consider is this question of estoppel.

It is said that the creditor by assenting to the deed and by then allowing more than twelve months to elapse, and by standing by and allowing the other creditors to alter their position, as some of them did, by withdrawing bankruptcy proceedings, and by allowing the debtor to act under the deed, and by paying over to the trustees that which, under the deed, he had promised to pay over to the trustee, is estopped from now alleging the invalidity of the promise. In order to come to a proper conclusion in respect of that matter, I think it is to be remembered that the Deeds of Arrangement Act is an Act which was passed in the public interest, and it avoids deeds of arrangement which are not registered and are not in accordance with the provisions of the Act, not in the interests of a particular debtor, or in the interests of all his creditors, but in the interests of the public generally. That it is a matter of public policy is, I think, made plain, amongst other things,

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by the provision in the Act itself, that a trustee who acts under a deed when once he knows that the deed is void, that is, knows that it has not been registered amongst other things, is subject to a penalty, which can be recovered on summary conviction, of a substantial sum per diem. Therefore, that the Legislature intended such deeds to be void and intended that members of the public should observe that enactment, under penalty, is, I think plain.

What then is the estoppel that is here alleged ? It appears to me plainly that it cannot be the ordinary estoppel in pais, the estoppel by words or conduct as to a representation of fact. There is no fact alleged here by the creditor. The only allegation of fact which can be made is the allegation that he has assented to the deed, which does not take one any further, because the deed is still void, or the representation that the deed is valid. As to that representation, first of all the representation would not be a representation of fact but of law, and, secondly, if it were a representation of fact, it is not a representation which would be believed by any one to whom it was made, for every one knew that the deed was invalid, because on the face of it it states that it is not to be registered, and every one to whom it was addressed knew that it was not to be registered, and every one who had assented to it by this letter had in fact in the letter stated that he understood it was not to be registered. But, to my mind, there are none of the essentials of the ordinary estoppel in pais. But a class of case is referred to, of which, I think, the strongest example is *Roe* v. *Mutual Loan Fund, Ld.* (1), in which it is said that, once a man has stood by, and taken advantage of a deed, even though it is invalid, he cannot thereafter come and say that it was invalid. That proposition appears to me to be very much too wide, and I do not think it is supported by the cases. The doctrine, such as it is, is one I think that is quite clearly founded on the ordinary principles of estoppel by representation, and I notice that, in the article on estoppel in Halsbury's Laws of England, vol. xiii., p. 364, s. 2, for which article that very great common law lawyer, the late

(1) 19 Q. B. D. 347.

Walton J., was responsible, cases of this kind are put in a separate category under the heading "Approbation and Reprobation," as being somewhat anomalous, and standing somewhere between estoppel by record and estoppel in pais. The cases which are there referred to, and which have been referred to here, such as *Roe* v. *Mutual Loan Fund, Ld.* (1), are cited as cases where a party has gone to the Court and has obtained an order of the Court—in the *Mutual Loan Case* (1), an order assenting to a composition—on one footing, and has after that come to the Court to ask for relief upon another, and inconsistent footing, and it has been held in some of those cases that he cannot take that course. Whatever the principle may be, it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid. I think an analogy is to be found in the Statute of Frauds. Those cases are far weaker as far as the public policy is concerned than this case under the Deeds of Arrangement Act. In cases under the Statute of Frauds the general principle has been, not that the Legislature has avoided contracts which are not made in accordance with the forms prescribed in the statute, but merely that those contracts shall only be proved in that particular way. In every single case under the Statute of Frauds, except in the case of contracts relating to an interest in land, it has been held authoritatively that part performance of a contract which is within the terms of the statute is not sufficient to preclude the party who has made the part performance, or who has received a part performance, from taking advantage of the statute. That was laid down in *Britain* v. *Rossiter* (2), and there can be no question about it; it is referred to in *Maddison* v. *Alderson* (3), which I have already cited. It was there pointed out that the principle on which equity will not allow a contract relating to an interest in land to fail where there has been a part

(1) 19 Q. B. D. 347. (2) (1879) 11 Q. B. D. 123.
(3) 8 App. Cas. 467.

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performance, rests upon the special doctrines relating to the conduct of the parties in express reference to that form of contract. I only wish to refer to a passage of the judgment of Lord Selborne in *Maddison* v. *Alderson*. (1) He says: "It has been recently decided by the Court of Appeal in *Britain* v. *Rossiter* (2) that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject matter than land; an opinion which seems to differ from that of Lord Cottenham (see *Hammersley* v. *De Biel* (3) and *Lassence* v. *Tierney*. (4)). That equity has been stated by high authority to rest upon the principle of fraud: 'Courts of Equity will not permit the statute to be made an instrument of fraud.' By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it; and I agree with an observation made by Cotton L.J. in *Britain* v. *Rossiter* (2), that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation, either of the precise grounds, or of the established limits, of the equitable doctrine of part performance." Then Lord Selborne proceeds to state what the true principles are upon which that doctrine rests in respect of contracts for the sale of land, and which it is unnecessary to pursue at present. The result of that appears to me to be this: that the so-called estoppel cannot exist so as to preclude the creditor from asserting that a deed which is declared to be void by the statute, as I say, on general grounds of public policy, was not, in fact, an invalid deed. The consequence of so holding would certainly be very remarkable, because if the doctrine could apply here, it would follow that as soon as a deed of arrangement had been entered into and assented to by the creditors, and anything had been done by the debtor or the trustee or any of the creditors, to the knowledge of the others, altering the position of the particular party, that deed would be valid and binding as against every person who was a party to

(1) 8 App. Cas. 474.
(2) 11 Q. B. D. 123.
(3) (1841) 12 Cl. & F. 64*n*.
(4) (1849) 1 Mac. & G. 551, 572.

it; that is to say, as against the debtor in respect of all his property, and in respect of all his creditors who were parties to it, and who might be the whole of his creditors at the time; and, subject to the provisions of the Bankruptcy Act, when once the period had elapsed at which the deed could be taken advantage of, or the period to which the title of the trustee in bankruptcy could relate back, had become the period subsequent to the date of the deed of arrangement, that thereafter, the transaction would be binding. If that were so, it appears to me that the statute might just as well be erased from the statute book. I cannot think that that is true, and in my opinion the principles which have been enunciated here make it fairly clear that that is not the position.

I think this principle that I have stated is really to be found and supported by the cases which have been referred to of *In re Bagley* (1) and *In re Lee* (2) and that a very considerable support for it is to be found in the express provision of the statute which has been referred to by the Master of the Rolls. If *In re Wilson* (3) is in any way an authority to the contrary, I feel bound to say that I do not agree with the law as stated by Horridge J., and I, personally, prefer the doubts expressed in the same case by Rowlatt J., which appear to me to be well founded, and based upon authority.

The other two cases to which we were referred were *Smith* v. *Baker* (4) and *Roe* v. *Mutual Loan Fund, Ld.* (5) As far as *Smith* v. *Baker* (4) is concerned, that case appears to me to be one which illustrates one of the most common propositions of the common law—namely, that you may waive the tort by claiming from the wrongdoer the proceeds of the goods, and that if you have done that, you have irrevocably committed yourself to that remedy, and you cannot afterwards bring trespass to recover damages, or to recover damages beyond the amount of the proceeds you have received.

(1) [1911] 1 K. B. 317.
(2) [1920] 2 K. B. 200.
(3) [1916] 1 K. B. 382.
(4) L. R. 8 C. P. 350.
(5) 19 Q. B. D. 347.

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Roe v. *Mutual Loan Fund, Ld.* (1), appears to me to be a case of precisely the same kind. There a debtor had granted as a grantor a bill of sale. The bill of sale was invalid, because it had not been properly registered. The grantee of the bill of sale had seized goods; I think he had seized them after the grantor had filed his own petition. He had seized the goods, sold them, and received the proceeds, and in the bankruptcy the debtor had put forward a proposal for a composition, which had been accepted and accepted upon the footing that the bill of sale holder had been paid the amount of his debt to the extent to which he had received the proceeds of the goods. That appears to me to be the plainest waiver by the debtor of the tort, and he had obtained the assent of the Court to that composition. After that, he brought an action for damages against the bill of sale holder, and it was held that he was precluded from so doing. Some general principles were stated in the Court of Appeal, which I think were not really necessary to the decision of that case, and which may require to be very carefully reconsidered when precisely that class of facts comes forward again; but that case is quite plainly distinguishable from the present case, first of all, on the ground I have stated—namely, that the tort had been waived—and, secondly, on the ground of the distinction which, as I say, is suggested by Walton J. in that passage on the law of estoppel—namely, that where the plaintiff in an action had obtained an order of the Court approving the composition on the footing that the deed was valid, he could not thereafter come to the Court and claim damages on the footing that the deed was invalid. That may be a sufficient ground for distinguishing that case. It appears to me that the principles I have stated are principles which were in operation long before *Roe* v. *Mutual Loan Fund, Ld.* (1), and are principles which are not controverted by that case. For these reasons, it appears to me that the so-called estoppel does not exist in this case, and that, therefore, the only contract relied upon being admittedly void, there is no reason for setting aside this bankruptcy notice.

(1) 19 Q. B. D. 347.

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We are dealing only with the bankruptcy notice, and nothing that we have said will affect the discretion of the learned registrar in dealing with the position when he has to decide whether, or not, a receiving order is to be made, if ever. The result is that I think the appeal must be allowed, that the order of the learned registrar must be discharged, and the application of the debtor be dismissed with costs, here and below.

Appeal allowed.

Solicitors for appellant company: *Cox & Cardale, for F. W. Watson, Manchester.*

Solicitors for respondent: *Lloyd & Armstrong.*

W. I. C.

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NEW YORK LIFE INSURANCE COMPANY *v.* PUBLIC TRUSTEE.

[1922. N. 644.]

Peace Treaty—Construction—"Property, rights and interests" of German Nationals within His Majesty's Dominions—Charge—Policies of Life Assurance issued by American Company—Simple Contract Debts—Locality—Corporation—Residence—Domicil—Treaty of Peace with Germany, s. IV.; Annex; s. V., art. 299; *Annex, para.* 4—*Treaty of Peace Order,* 1919, *s. I. (xvi.).*

The plaintiff company was incorporated by special Act of the Legislature of New York, and had its central office and the bulk of its assets in New York. The company had a branch in London and in most of the capitals of Europe, the branch in Paris being its head office for Europe. The general manager of the London branch had no general authority to issue policies in this country. Certain life policies signed by the president and secretary of the company and countersigned by the general manager for Europe, were issued in London to German nationals before the outbreak of the war. The policies were not under seal. The policy moneys were expressed to be payable in London, but all premiums were payable either at the central office in New York or at the office where the insurance was payable, and proofs of death were to be furnished at the New York office. An indorsement on the policy provided that it should be construed according to English law.

In an action to determine whether the policy moneys payable under the policies in question, which had matured on or before January 10, 1920, the date when the Treaty of Peace with Germany came into force, were

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"property, rights and interests within His Majesty's Dominions" belonging to German nationals and as such were subject to the charge created by s. I. (xvi.) of the Treaty of Peace Order, 1919, Romer J. held (1.) that there was nothing in art. 299 of s. V. of the Peace Treaty, or in para. 11 of the annex thereto, to indicate that the property, rights and interests of the assured under such contracts were to be excluded from the general charge under para. 4 of the annex to s. IV.; but (2.), that the policy moneys in question, being simple contract debts, were situate in the country in which the plaintiff company was residing, notwithstanding that they were expressed to be payable in London; that the residence and domicil of the company were determined by the locality of its principal place of business, which, in all the circumstances, was New York; and therefore that the debts due under the policies were not within His Majesty's Dominions, and therefore were not subject to the charge:—

Held, on appeal, that the decision of Romer J. on the first point was right, but as to the second point:

Held, that inasmuch as a corporation might have a dual residence, and there was evidence that the plaintiffs were resident both in New York and in London carrying on business in both places and in both places being subject to the jurisdiction of the Courts, it was permissible and necessary to look at the terms of the contracts and to determine from them at what place the debts would be recoverable. Applying that test in the present case, the debts were recoverable in London where they were expressed to be payable, and, that being so, they were situate within His Majesty's Dominions and became subject to the charge.

On this point, decision of Romer J. [1924] 1 Ch. 15 reversed.

Attorney-General v. *Bouwens* (1838) 4 M. & W. 171; *Toronto General Trusts Corporation* v. *The King* [1919] A. C. 679; *Hilliard* v. *Cox* (1700) 1 Ld. Raym. 562 and *Rex* v. *Lovitt* [1912] A. C. 212 applied.

APPEAL from the decision of Romer J. (1)

The question was whether certain sums due and payable on January 10, 1920 (the date when the Treaty of Peace with Germany came into force), by the plaintiffs to various German nationals under policies of assurance, issued by the plaintiffs in this country before the outbreak of war, were "property rights and interests within His Majesty's Dominions" belonging to German nationals on January 10, 1920, and accordingly subject to the charge created by s. 1 (xvi.) of the Treaty of Peace Order, 1919. The constitution of the plaintiff company, its methods of carrying on business and the forms of the policies issued, together with the result of the evidence at the trial of the action, are stated in the judgment of the learned judge. (2)

(1) [1924] 1 Ch. 15. (2) [1924] 1 Ch, 18.

Romer J. held that there was nothing in art. 299 of s. V. of the Treaty of Peace with Germany, or in para. 11 of the annex thereto, that indicated that the property, rights or interests of the assured under such contracts were to be excluded from the general charge under para. 4 of the annex to s. IV. But he further held that the policy moneys in question, being simple contract debts, were situate in the country in which the debtor was residing notwithstanding that they were expressed to be payable in London; that the residence and domicil of the company were determined by the locality of its principal place of business, which in all the circumstances was New York; and that, therefore, the simple contract debts of the plaintiff company due under the policies to German nationals on January 10, 1920, were not at that date within His Majesty's Dominions, and accordingly were not subject to the charge referred to in s. IV. of the Peace Treaty and created by s. I. (xvi.) of the Treaty of Peace Order, 1919.

The defendant appealed. The appeal was heard on March 5 and 6, 1924.

Sir Douglas Hogg K.C., *Gavin Simonds* and *C. Harman* for the appellant. These policy moneys are subject to the charge under the Treaty of Peace Order. There is an express contract in the policies that the moneys shall be paid in London, and that the policies are to be governed by English law. The policies are simple contract debts and the question is what is their locality. Romer J. has held that they are situate in New York, where the plaintiff company resides. It is submitted that a company may have more than one residence, and its residence for this purpose is where the debt is payable. The principle is set out in Dicey on the Conflict of Laws, 3rd ed., cap. ix., r. 76, p. 342, where the learned author says that "debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced": see also *Lord Studeley* v. *Attorney-General* (1) and *Hilliard* v. *Cox*. (2)

(1) [1897] A. C. 11. (2) 1 Ld. Raym. 562.

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Romer J. in coming to his conclusion followed the rules laid down by Lord Abinger C.B. in *Attorney-General* v. *Bouwens* (1) as to the locality of various kinds of choses in action and titles to property. It was there laid down that for the purpose of jurisdiction simple contract debts must be taken to be situate where the debtor resides at the time of the testator's death. Applying that rule the learned judge has held that the policies are payable at the place where the debtors, the plaintiff company, reside—i.e., in New York. In the case of an individual that rule is easily applied, because an individual, even if he has more than one residence, must be residing at a particular time at one of them. But a corporation may have more than one residence and the debt may be localized at one of them: *Carron Iron Co.* v. *Maclaren* (2); *La Bourgogne* (3); *Haggin* v. *Comptoir d'Escompte de Paris* (4); *Newby* v. *Von Oppen* (5); *Saccharin Corporation* v. *Chemische Fabrik von Heyden Aktiengesellschaft* (6); *Mitchell* v. *Egyptian Hotel Co.* (7); *American Thread Co.* v. *Joyce.* (8)

That being so, in this case it is necessary to ascertain where the debt is recoverable and can be enforced, and, by the express terms of the contract, that is in London. *Rex* v. *Lovitt* (9) covers this case exactly. If that case had been cited to the learned judge it is submitted that his decision would have been different.

[They also referred to Webster Brown on the Finance Acts, 1894–1919, 4th ed., pp. 60–62.]

Schiller K.C. and *H. G. Robertson* for the respondents. A corporation cannot strictly have two residences, though by its officers it may carry on business in more than one place. It cannot rightly be said that these simple contract debts are locally situate in this country. It is open to the German creditors to go to America and demand payment there. In the case of simple contract debts the locality is determined

(1) 4 M. & W. 171.
(2) (1855) 5 H. L. C. 416.
(3) [1899] P. 1; [1899] A. C. 431.
(4) (1889) 23 Q. B. D. 519.
(5) (1872) L. R. 7 Q. B. 293.
(6) [1911] 2 K. B. 516.
(7) [1915] A. C. 1022.
(8) (1912) 6 Tax Cas. 1, 31.
(9) [1912] A. C. 212.

by the residence of the debtor, and that is, in this case, New York, where the plaintiff company "keeps house and does business": *Attorney-General* v. *Bouwens* (1); *Toronto General Trusts Corporation* v. *The King*. (2) *Rex* v. *Lovitt* (3) was a very different case.

[As to the other point which Romer J. decided against the plaintiff company, they repeated the contention raised in the Court below.]

Gavin Simonds in reply. There has been a statutory assignment of the contractual rights of the German nationals to the custodian. It is said that the head office of the plaintiffs is in New York. It is not relevant to say that there is a right to sue in New York. A corporation may be resident in more than one place. *Toronto General Trusts Corporation* v. *The King* (2) affords a good analogy. If the debt is localized in more than one place the circumstances of the particular contract must be considered in order to determine where it is recoverable. This debt is here in England, where alone it can be enforced.

[On the other point he was stopped.]

POLLOCK M.R. This is an appeal from a judgment of Romer J. in an action for a declaration that certain policies of life insurance and the rights of German nationals respectively entitled thereto are not subject to the charge created by the Treaty of Versailles and the Treaty of Peace Order, 1919. Two classes of policies are involved, one consisting of policies upon the death of the insured, of which policies the one insuring the life of one Weitzner is the type, and the other consisting of endowment policies which contain an option of further continuance or discontinuance after the due date for payment has arisen, of which class a policy in favour of F. Bammert is taken to be the type. In Weitzner's policy the agreement is to pay the sum insured to the insured's executors, administrators or assigns, at the principal office of the company in London, England,

(1) 4 M. & W. 171. (2) [1919] A. C. 679, 684.
(3) [1912] A. C. 212.

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immediately upon receipt of proof of death, and it also contains the following two clauses: (1.) "Each selection, change or revocation of a selection shall be made by the insured in writing, and shall not take effect until endorsed on this policy by the company at its principal office in London"; and (2.) "The beneficiary can neither assign nor commute unpaid instalments, unless such right is given to the beneficiary by the insured in writing, and is endorsed on this policy by the company at its principal office in London, during the lifetime of the insured." In the case of Bammert the terms of the policy were that the company agreed to pay 250*l.* to the insured's executors, administrators or assigns at the office of the company in the City of London, and the policy does not contain the two terms which I have read out of the Weitzner policy, but it does contain a clause that the policy is to be construed according to English law. In the case of Weitzner, it may be important therefore to observe that, subject to certain conditions that are to be fulfilled, and fulfilled in London, there may be an assignment or dealing with the policy within the jurisdiction of the present Court. The question arises whether or not these sums which are payable in London under these policies are caught by the terms of the Peace Treaty Order. The learned judge has held that they are not so caught, and it is from that judgment that this appeal is brought. Clause 1 (xvi.) of the Peace Treaty Order provides that: "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force . . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged." Is this debt, this chose in action, a part of the property of a German national so as to fall within and be subject to that charge? It is admitted that the persons who are referred to in the statement of claim were at all material times German nationals, and the date at which the Peace Treaty came into force was January 10, 1920. The question, therefore, in the action, is whether or not at that date the German nationals who are referred to in the statement of

claim or their representatives are entitled to receive the sums due under the policies of life insurance, or whether the sums were caught by the Peace Treaty Order. The policies referred to are policies in respect of which payments accrued due before January 10, 1920.

It is said by the respondents to this appeal that these debts due from the insurance company are not property, rights or interests within His Majesty's Dominions, because the head office of the company is at New York, and up till recently (whether this is now so or not does not matter) the head office for the purposes of European business was in Paris, and, therefore, inasmuch as the head office is not within His Majesty's Dominions, these debts are not within the terms of cl. 16 of the Treaty of Peace Order, for the locality of a debt depends upon the residence of the debtor, and the residence of the debtor in this case is said to be New York, and for this purpose, New York only. The learned judge said in his judgment (1): "A corporation cannot of course in strictness be anywhere. But what place on January 10, 1920, was most analogous to the place physically occupied by an individual? It seems to me in all the circumstances that the answer to this question must be New York." Hence he holds that the locality of the debtor in these circumstances was New York, and, therefore, outside the ambit of cl. 16, and he follows for the purposes of his decision, the rules which are laid down in *Attorney-General* v. *Bouwens*. (2) That case lays down certain rules, and I think the judgment of Lord Abinger C.B. has been accepted as stating the rule of law applicable to this matter. He says: "As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens

(1) [1924] 1 Ch. 27. (2) 4 M. & W. 171, 191, 192.

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to be; and simple contract debts, where the debtor resides at the time of the testator's death." In that case, what was in question were certain Dutch bonds payable by the Netherlands Government to Bouwens. The question which had to be decided was whether there was jurisdiction in respect of those bonds to grant probate for the purpose of giving a legal title to the estate, which included those Dutch bonds, and, after stating the rule, in particular the rule as to simple contract debts: "Where the debtor resides at the time of the testator's death," the Chief Baron goes on to say: "In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be. These distinctions being well established, it seems to follow that no ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad." He did not determine the matter, because the Court held that, inasmuch as the ordinary way of dealing with the bonds which could be transferred, they being bonds to bearer, was within the jurisdiction, that was sufficient to justify the jurisdiction of the ordinary being exercised and probate, for the purposes of the administration of the estate, being granted on the basis—not that the debtor would pay the sum within the jurisdiction, but that the debts could be assigned and negotiated within the jurisdiction quite apart from whether or not the debtor paid them or not. That decision has been considered in *Smelting Co. of Australia, Ld.* v. *Inland Revenue Commissioners.* (1) Rigby L.J. there said that there was a distinction in that case, the bonds in question were transferable by delivery—what was relied on was that they were matters of sale and purchase in this country, and, therefore, might well have a local situation here in the eye of the law, and I observe with some interest that he treats *Attorney-General* v. *Bouwens* (2) as decided upon the basis that the subject matter of that action were

(1) [1897] 1 Q. B. 175, 183. (2) 4 M. & W. 171.

matters of sale and purchase in this country, and could be dealt with in this country, though the ultimate payment of the debt would have to be by a debtor beyond these shores. It is said that applying the rule in *Attorney-General* v. *Bouwens* (1), the debt is payable in New York and not elsewhere. It is open to make this observation—that, having regard to the actual decision in *Attorney-General* v. *Bouwens* (1) and the observation of Rigby L.J. to which I have called attention, inasmuch as by proper notice given in the case of Weitzner in London, it would have been possible to assign this debt and deal with it over here, it might be said on that ground, and on that ground alone, that there was sufficient to indicate that this debt might be dealt with within the jurisdiction. But, without dwelling on that, I turn to the passage contained in Professor Dicey's Conflict of Laws, 3rd ed., p. 342, in which he lays down the proposition: "Debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced," and I attach great importance to those words, "Where they are properly recoverable or can be enforced," because I think they have been carefully chosen in order to indicate the effect of a number of decisions, to some of which it may be necessary to refer. In *Attorney-General* v. *Lord Sudeley* (2) the rules laid down in *Attorney-General* v. *Bouwens* (1) appear to be accepted, and, more than that, it is said that: "As to debts due to the testator at the time of his death, the rule to be deduced from the cases is that if the debtor is, at the date of the death of the testator, abroad, and the debt is payable only abroad, and could only be got from him abroad, either by some act to be done there or some proceeding taken there, the debt is a foreign asset; but if, although the debtor is abroad, a legal proceeding could be taken here, which would, in law, directly order and enforce the payment here of the debt, then the debt is an asset here liable to the probate duty." In *Hilliard* v. *Cox* (3) Lord Holt C.J. said: "If the debtor has two houses

(1) 4 M. & W. 171.
(2) [1896] 1 Q. B. 354, 360.
(3) 1 Ld. Raym. 562.

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in several dioceses, and at the time of the death of the debtee and commission of administration is inhabitant and resident at one of the houses, that would exclude the jurisdiction of the ordinary of the diocese in which the other house stood." In other words, his residence in one, whichever it be at the relevant date, will determine the locality of the debt.

It is said, we may apply the similar doctrine of a debtor having two houses to the present case, because a corporation like the present plaintiffs, being an incorporated company, may have more than one residence, and, further, the decision in the *Carron Iron Co.* v. *Maclaren* (1) is cited. There Lord St. Leonards laid down rules which, although his judgment was a dissenting judgment, are in no way affected by the decision of the majority, and it is not too much to say that that case was accepted as establishing the proposition that a company may have more than one residence. He says (2): "I think that this company may properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domiciles. Its business is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured." And he says (3): "There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business, one is just as much a domicile of the corporation as the other." It is sufficient to point out that in *Carron Iron Co.* v. *Maclaren* (1) it was established, not for the first time, that a company may have two residences, and may, for the purpose of carrying on its business, be equally subject to both local jurisdictions.

In *Newby* v. *Von Oppen* (4) it was held that a foreign corporation carrying on business in England, although not incorporated according to English law, may be sued as defendant in an English Court in respect of a cause of action which arose within the jurisdiction, and there, following

(1) 5 H. L. C. 416.
(2) 5 H. L. C. 449.
(3) 5 H. L. C. 459.
(4) L. R. 7 Q. B. 293.

Carron Iron Co. v. *Maclaren* (1), it was held that inasmuch as they were carrying on a business in London, the American company had made themselves subject to this jurisdiction, and must, said the Court, be treated as resident or present here, and the same, I think, was said by Cotton L.J. in *Haggin* v. *Comptoir d'Escompte de Paris* (2) and *La Compagnie Générale Transatlantique* v. *Thomas Law & Co. La Bourgogne* (3) is a case which follows the same principle which I have already enunciated from *Carron Iron Co.* v. *Maclaren.* (1) Lord Halsbury in that case says (4): "It appears to me that as a consequence of these facts"—that is, carrying on business in this country—"the appellants are resident here in the only sense in which a corporation can be resident—to use the phrase which Mr. Joseph Walton has so constantly referred to, they are 'here'; and, if they are here, they may be served," and they are subject to the jurisdiction.

If that be so, there is clear evidence that the plaintiffs in this case are resident both in New York and in London, in both places they carry on a business, and in both places they are subject to the jurisdiction of the Courts. Then how is the determination to be reached whether they are to be treated as subject to the present jurisdiction, so that it may be said that the debt is due from the plaintiffs as being resident here, inasmuch as the debtors reside both in London and in New York? It seems to me we are entitled, in those circumstances, to look at the terms of the contract, and to determine from them what, for this purpose, is to be the place in which, and at which, the debt would be recoverable. Following out that principle it seems to me clear that primarily the debt is recoverable in London. In both those policies of insurance the promise was that the money should be paid at the head office of the company in London. Now going to *Rex* v. *Lovitt* (5), in which I think the point to be determined was analogous to the present case, it was said: "In each of these

(1) 5 H. L. C. 416.
(2) 23 Q. B. D. 519.
(3) [1899] P. 1; [1899] A. C. 431.
(4) [1899] A. C. 433.
(5) [1912] A. C. 212, 219.

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cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch." I am of opinion that that same reasoning is applicable here, and that in the present case the very terms of the contract of insurance have, primarily at all events, localized the place where the debt is to be paid as London. It may be that if the money was not paid in London some form of suit could be taken in New York by the person who had failed to receive payment in London, but I think counsel for the appellant is quite right in saying that the plaintiffs would have to make tender in London and the executors of the deceased would have to make application in London, so that, primarily, following the words in *Rex* v. *Lovitt* (1), London is indicated as the place at which this debt is localized for present purposes. That being so, then the debt is one which falls to be paid within the United Kingdom, and the words of cl. 16 of the Treaty of Peace Order are applicable, as the debt is part of the property, rights or interests of a German national within His Majesty's Dominions.

I do not refer to the income tax cases, or other tax cases, which, I think, must be considered closely in relation to the terms of the statute upon which the circumstances arose for decision. I base my judgment upon the fact that even accepting that there are two residences of the plaintiff company, the particular residence at which this debt arose, and at which it is proposed to be paid, is localized, and therefore, in accordance with the terms stated in Professor Dicey's book in this case the debt or chose in action may be looked upon as situate in this country, because it is the country where it is properly recoverable and can be enforced.

Upon the other point that was decided by the learned judge in favour of the defendant I will only say a word or two. It is suggested that in some way art. 299, which deals with the question of the dissolution of certain contracts, can be made use of to control and to alter art. 297, the article which

(1) [1912] A. C. 212, 219.

gives rise, first of all, to the retaining and liquidation of property, rights and interests belonging to German nationals, and in the annex, gives the right to charge the property, rights and interests of German nationals which is the foundation of the terms of the Treaty of Peace Order, and the Schedule which contains art. 297.

In my opinion, there is no validity in the point that is taken. Art. 299 was intended to deal with, and did deal with, the question of the dissolution of contracts, and excepted from dissolution certain particular classes of contracts which are maintained in full force. The mere fact that those contracts are maintained in full force does not prevent their also falling, in proper cases, under art. 297, and the consequent charge upon them. The right to have those contracts enforced, which is safeguarded by art. 299, may inure to the benefit of German nationals, even though those contracts fall to be charged under art. 297, because the German national has in respect of the contracts, or property, rights and interests which are charged, some rights against his own Government, which, under the scheme of the Treaty, he should be able to make use of and enforce if, by virtue of the charge imposed in a victorious country, he lost in the first instance the full fruit of the contract which was maintained, or, if necessary, rehabilitated by virtue of art. 299. I do not think that the two articles are intended to be read together. I think the learned judge has come to a perfectly right conclusion upon that point, and there is no ground for setting aside his decision. However, on the main point I think that the plaintiffs are not entitled to the declaration they have asked for, and the learned judge was wrong upon that point, therefore this appeal must be allowed, and it would be right to make the declaration which Warrington L.J. will state, in view of the terms of the notice of appeal.

WARRINGTON L.J. The plaintiffs owe certain simple contract debts to German nationals, and the question that arises is, are the rights of those German nationals, in respect of such debts, included in the expression "property, rights

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and interests within His Majesty's Dominions of German nationals," and thus subject to the charge created by the Treaty of Peace Order of August, 1919? Romer J. held that they are not included as property, rights and interests within His Majesty's Dominions. The proceedings take the form of an action by the debtor against the Public Trustee, representing the interests of the Crown, for a declaration that these rights and interests are not subject to the charge, and the learned judge has made that declaration. It is from that that the Public Trustee appeals. I shall have to say something about the form of the action hereafter.

These, then, are simple contract debts. The rule of law with regard to the locality of simple contract debts is that it is determined by the residence of the debtor at the material moment. That has been well settled for a long time, and I think the reason for that is that it is the residence of the debtor which determines the place where he may be sued, prima facie at all events, and is in general the place where the means of satisfying any judgment may be discovered, but whatever the reason is, there is no doubt that that is the rule. There is no difficulty in applying that rule in the case of a physical person, because he cannot be resident in more than one place at the same time, but the serious difficulty does arise in the case of a corporation, because the fictitious person which we call in legal phraseology a corporation may be resident in more places than one, and at the same time. Lord St. Leonards stated that in very clear terms in a speech in the House of Lords, to which reference has often been made, in *Carron Iron Co.* v. *Maclaren* (1); it was a dissenting speech, but that makes no difference to the particular point. What he says is this, talking about a Scotch company having a manufactory in Scotland and having an office in England: "There may be two domiciles and two jurisdictions"—when he is using the word "domicile" there, I think it is quite clear he only means residence, he does not mean domicile in the more technical sense in which it is sometimes used—"and in this case there are, as I

(1) 5 H. L. C. 416, 459.

conceive, two domiciles and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business, one is just as much the domicile of the corporation as the other." A corporation therefore may have two residences, and each residence may be as much its residence as another residence for the purpose of legal jurisdiction at all events. In this case, this corporation has two residences; its principal place of business is in New York, but it has in England, London, an office with a manager in charge at which it carries on an English business, and it is resident in London for purposes of jurisdiction, it could be sued and execution could be issued against its property in and by these Courts in just as effectual a manner as such steps could be taken against a physical person, physically resident in this country.

It is unnecessary to refer to the great number of cases on that subject, it is enough to mention one in this Court: *Haggin* v. *Comptoir d'Escompte de Paris.* (1) When, therefore, the question arises as to the locality of a debt, and the debtor is a corporation, the place or residence is the thing to which you are to resort as a criterion for the purpose of determining the locality of the debt. The real problem, I think, is not that the rule of law is altered, the rule of law still remains the same and the criterion is the residence of the debtor; but in the peculiar case to which I am referring it is necessary to say which of several residences is for this purpose to be treated as the residence of the debtor. The only way of settling that question that I can see is to take the contract which creates the debt and look at that and see whether, having regard to its terms, the parties have themselves selected for this purpose one of the several residences in question; and if you can find that, then I think that that place which they have selected will be the residence for the purpose of determining the locality of the debt.

I now turn to these contracts; they are all insurance contracts. The money is payable in sterling and it is payable at the London office of the company. There are several minor

(1) 23 Q. B. D. 519.

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provisions as to matters which are to take place at the London office, but the really important provisions are that the debt is payable at the London office, and that the payment is to be in sterling. Under such a contract as that, the contract in terms could only be performed by payment at the London office, payment elsewhere would be useless, the creditor's demand elsewhere would be useless. The place at which the debt is to be paid is laid down by the contract, and it seems to me that that provision is exclusive. If that contract is not performed, if the demand is made here, and the debt is not paid here, then, no doubt, an action could be brought against the corporation wherever it could be found at any one of its several residences, including New York; but in that case the action would be not for a debt, but for breach of contract in not paying the debt at the place at which the corporation contracted to pay it. This view which I have expressed as to the mode in which the question may be solved where residence is ambiguous is not without authority. There are two cases, curiously enough both of them coming from Canada, in which similar problems have had to be solved. The first case is *Toronto General Trusts Corporation* v. *The King*. (1) What was ambiguous there was the locality of a specialty debt. That locality is usually fixed according to the rules of common law as being the place where the document creating it is actually found at the material moment. In the case in question there happened to be two documents creating the specialty debt, one document was in Alberta and the other document was in Ontario, and the question was in which of the two Provinces was the debt locally situated. The Privy Council there resorted to a consideration of the facts of the case, finding that the specialty debt was a mortgage on land in Alberta, that it was registered in Alberta, that by the law of Alberta the mortgage deed was retained in the registry, and that the document which was in Ontario was a duplicate of it—of course, it was just as much a deed creating the specialty debt, it was not a copy, it was a duplicate, as the

(1) [1919] A. C. 679.

other in Alberta; but finding all those facts, the Judicial Committee came to the conclusion that in that case the specialty debt must be treated as localised in Alberta. There it will be seen an analogous difficulty arose to that which arises in the present case. But a case which is much nearer the present case is *Rex* v. *Lovitt*. (1) There the difficulty arose from the fact of the debtor being a corporation, the debt being a simple contract debt, and that corporation having a residence both in London and in New Brunswick. The debt was a banker's deposit, the debtor was a bank with its chief office in London and a branch in New Brunswick. The Privy Council determined in that case that the residence of the debtor for the purpose of determining the locality of the debt was the New Brunswick residence. The way in which it was put by Lord Robson in delivering the judgment of the Privy Council was this: "In each of these cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch. The present case comes well within the principles thus laid down, and their Lordships are of opinion that these debts were 'property situate within the Province' of New Brunswick." There, what was resorted to was the course of business as between banker and customer with the object of selecting the particular residence as the determining one; in the present case there is no necessity to resort to any course of business, we have the express terms of the contract. I am perfectly willing to admit that there may arise difficult questions in some cases having regard to the differences in the municipal laws of different countries; according to the law of one country it may be that these debts which we are prepared to hold are localised in England might be held to be localised elsewhere, but what we have to do is to give our decision upon the municipal law of this country and upon the facts and circumstances of this particular case: it is on that footing that I am of opinion that these particular

(1) [1912] A. C. 212, 219.

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debts are localised in this country for the purposes of the Peace Treaty Order.

We are asked by the Crown in reversing the decision of Romer J. to make an order declaring that the moneys due and payable under these several policies of insurance are subject to the charge created by the Treaty of Peace Order of 1919. The parties before the Court are the debtor, that is to say the New York Insurance Company, and the Crown, or the Public Trustee, who claims that the property is subject to the charge. The creditors, the persons to whom the debts are payable, are not parties, and it seems at first sight wrong to make a declaration affecting their rights in their absence. Of course in ordinary cases it is exceedingly unusual, to say the least of it, to make any such declaration, but one must bear in mind in these cases under the Treaty that they are not ordinary cases of determining rights inter partes; the existence of a charge is only one step in settling a number of international relations, and not only that, but the effect of declaring that the property is subject to a charge in such cases as the present is amongst other things to entitle the persons who are entitled to the property to claim against the German Government for repayment for what may have been realized by virtue of the charge in this country. The circumstances, therefore, are peculiar, and I think it is right to accede to the request of the Crown, and the plaintiffs having asked for a declaration that the property is not subject to the charge, to set that order aside and to make the declaration asked for by the notice of appeal, which seems to be in correct form.

I say nothing about the other point. I am quite content with the judgment of Romer J., and I quite agree with what has been said by the Master of the Rolls upon it.

I think the appeal ought to be allowed, and in lieu of the declaration made by Romer J., there ought to be made the declaration asked for by the notice of appeal.

ATKIN L.J. The question we are asked to determine is: Whether or not the rights existing under certain policies of

life insurance issued by the New York Life Insurance Company in London to German nationals are "property, rights and interests within His Majesty's Dominions belonging to German nationals." If they are, then they are charged in pursuance of cl. 1, s. 16, of the Peace Treaty Order, 1919.

The question as to the locality, the situation of a debt, or a chose in action is obviously difficult, because it involves consideration of what must be considered to be legal fictions. A debt, or a chose in action, as a matter of fact, is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt or chose in action is situated, and certain rules have been laid down in this country which have been derived from the practice of the ecclesiastical authorities in granting administration, because the jurisdiction of the ecclesiastical authorities was limited territorially. The ordinary had only a jurisdiction within a particular territory, and the question whether he should issue letters of administration depended upon whether or not assets were to be found within his jurisdiction, and the test in respect of simple contracts was: Where was the debtor residing? Now, one knows that, ordinarily speaking, according to our law, a debtor has to seek out his creditor and pay him; but it seems plain that the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt. I think that is a very material consideration. The result is that in the case of an ordinary individual by that rule for a long time the situation of a simple contract debt under ordinary circumstances has been held to be where the debtor resides; that being the place where under ordinary circumstances the debt is enforceable, because it is only by bringing suit against the debtor that the amount can be recovered. There are complications because, at any rate, according to our law, it is possible in some cases to bring suits against the debtor in a territory where he is not residing by reason of the processes

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by which we have given our Courts jurisdiction in respect of certain matters to be performed within the jurisdiction, by serving the debtor, resident out of the jurisdiction, with notice of the proceedings, and, therefore, cases do arise where a debt may be enforced in one jurisdiction, and the debtor, being an ordinary living person, resides elsewhere. In respect to those matters, I do not propose to say anything, because that question does not arise here; but the ordinary rule in respect of a debtor is that the debt is situate where the debtor resides, because there the debt can be enforced against him by process of law.

Now, when you are dealing with a corporation, you are dealing again with a legal notion, and you have to examine the question where the debt can be said to be situate. It appears to me plain that a corporation according to our law is deemed to reside for the purposes of suit in the place where it carries on business in its own name, and in the case of corporations, you have many activities in many countries, such as the big insurance companies—for example, the plaintiffs in this case. It appears to me that the true view is that the corporation resides for the purposes of suit in as many places as it carries on business, and it is to be noticed that in ordinary cases where an obligation is entered into by the corporation without any particular limits of the place where it is payable, inasmuch as that obligation is an ordinary personal obligation which follows the person, you have in each jurisdiction a right to sue the corporation there; the corporation is resident there, and the obligation is enforceable there. Under ordinary circumstances the debt would be situate in each place where the corporation can be found.

I think that gives rise to some difficulty in a matter of this kind. Inasmuch as the right in question is a chose in action and a chose in action involves the right of suit, and there is only a right of suit in this country to recover this sum of money against the insurance company, it appears to me impossible to say that that right is not a right which is situate here, because it exists here and it is the only conceivable place where you can have a chose in action and a

right to sue in the Courts of this country. I think that is a right which, in normal circumstances, can properly be said to exist here, and from that point of view, it appears to me it may well be, and I think it is the fact, that simple contract obligations can be situate in more than one place. I think the passage which was cited to the contrary in *Toronto General Trusts Corporation* v. *The King* (1) in the Privy Council has been misunderstood. The Lord Chancellor there was speaking only of specialty debts, and in respect of specialty debts, the test has always been not the place and residence of the debtor, but the actual place where the actual document constituting the specialty exists—namely, where the piece of paper is to be found, and in reference to that it is, of course, quite obvious that the piece of paper cannot have an existence in more than one place, but speaking of simple contract debts generally I think what I have said must be true. If, in fact, the contractual obligation may exist in several places, it is plain that complications may arise under the Treaty, because if other countries have adopted the Treaty, and have made it part of their municipal law, it would be quite possible that the same debt was charged in every country, and I can well understand that the insurance companies may find themselves in a considerable difficulty when they have to solve the problem to whom they are to make payment; therefore, I think in such a case as this, it may be necessary to adopt some further principle than the simple principles which I have applied. In this case, I think there is really no difficulty at all, because the actual contracts are expressed to be contracts to pay a sterling sum in London. It is perfectly true that if that obligation is not complied with there may be a further right of action against the corporation, wherever it may be found, for breach of contract to pay sterling in London; but the primary obligation is an obligation to pay in this country, and under those circumstances it appears to me the right view is, the right under this policy is to receive these sums of sterling upon the happening of the appropriate

(1) [1919] A. C. 679.

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Atkin L.J.

event, either at the death of the insured, or the expiration of the period at which he becomes entitled to payment of the money. That right is situate in this country and only in this country. Therefore, it appears to me this is a case where these particular rights are charged under the section of the Peace Treaty which I have read. I think it follows that the custodian is right in the contention which he makes about the declaration. I myself have found, and still find, considerable difficulty in determining what ought to be done by the Court, from the fact that the policy holders are not before the Court, and one feels that one is coming to a conclusion upon a matter which is of obvious interest and concern to them and is making a declaration in respect of matters which, quite clearly, affect their rights in their absence; but the matter having come so far, and declarations having been made by the learned judge, I think it important that it should be dealt with. I am therefore prepared, even in the absence of, I should have thought, the necessary parties, to make the necessary declaration in order to give effect to our view. But I must say that I think it is unfortunate, and this case ought not to be made a precedent so far as the question of parties is concerned. I agree with the order which has been proposed by the Lord Justice.

Upon the second part of the case I have nothing to add to what has been said by the learned judge below and by the Master of the Rolls. It appears to me that the contention raised by the plaintiffs is quite untenable.

Appeal allowed.

Solicitors for the appellant: *Coward & Hawksley, Sons & Chance.*

Solicitors for the respondents: *Ashurst, Morris, Crisp & Co.*

G. A. S.

In re WARTLING TITHE REDEMPTION.

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March 10.

[1923. A. 371.]

Practice—Costs—Tithe Rentcharge—Compulsory Redemption—Compensation—Option to require Payment into Court or to Trustee—Exercise of Option—Power to revoke—Money paid into Court—Application for Investment—Tithe Act, 1846 (9 *&* 10 *Vict. c.* 73), *s.* 9—*Tithe Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 54), *s.* 3—*Judicature Act*, 1890 (53 *&* 54 *Vict. c.* 44), *s.* 5.

By a settlement dated in 1893 certain tithe rentcharges payable out of lands situate at Wartling, Sussex, were settled, subject to certain life interests which had determined, to the use of H. for life with remainders over. The settlement contained a proviso appointing the trustees of the settlement trustees for the purposes of the Settled Land Acts, and providing that a sole trustee should be competent to act for all the purposes of the Acts, including the receipt of capital money. In 1899 H. assigned his life interest in the rentcharges to C. In 1905 C. died, having by his will devised his real and personal estate to the respondents and appointed them his executors. In 1922 the appellant, who was the owner of the land out of which certain of the tithe rentcharges were payable, in exercise of the power given him by s. 3 of the Tithe Act, 1918, applied to the Ministry of Agriculture and Fisheries for the redemption of certain of these charges, amounting to 48*l.* 10*s.* 8*d.* and 5*s.* respectively, and for the determination by the Minister of the amount of the consideration money payable in respect thereof. On September 20, 1922, the respondents, in exercise of their option under s. 9 of the Tithe Act, 1846, signed a form of consent which had been sent to them by the Ministry to the payment of the consideration money to the surviving trustee of the settlement of 1893. A month later they wrote to the Ministry revoking their consent and requesting that the money might be paid into Court. The Ministry thereupon wrote to the appellant directing him to pay the money into Court, which he accordingly did. On February 12, 1923, the respondents took out an originating summons for an order that the fund in Court might be invested and the income therefrom paid to the respondents or the survivor of them as and when received during the life of the tenant for life. P. O. Lawrence J. made the order asked for, and following the decision of Neville J. in *In re Graham-Wigan* [1911] 2 Ch. 438, by which he considered himself bound, directed that the appellant should pay the costs of the application.

On appeal as to costs :—

Held, that, on an application to invest money paid into Court representing compensation paid under the Tithe Acts on the redemption of rentcharges, there is no general principle that requires the Court to direct that the person exercising the compulsory powers under the Acts should bear the burden of the costs; but that the costs were, under s. 5 of the Judicature Act, 1890, in the discretion of the Court entirely unfettered by any such general principle.

Held, also, that P. O. Lawrence J. ought to have exercised his discretion

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by holding that the appellant, who had been brought before the Court solely for the purpose of making him liable for costs, was not so liable, and to have dismissed the application as against him with costs.

Semble. There is no power in the Tithe Acts which enables a tithe-owner who has once exercised the option given him by s. 9 of the Act of 1846 to revoke or alter the exercise of it.

In re Graham-Wigan [1911] 2 Ch. 438 overruled.

Decision of P. O. Lawrence J. as to costs reversed.

APPEAL from the decision of P. O. Lawrence J.

By a deed of settlement dated July 3, 1893, and made between Maria Georgina Hayley of the first part, John Newton Hayley of the second part and George Howard and Alfred Money Wigram of the third part, for the consideration therein mentioned, M. G. Hayley as settlor granted and conveyed unto G. Howard and A. M. Wigram All that rectory or parsonage impropriate of Wartling in the county of Sussex with all the tithes tithe commutation rentcharges glebe lands oblations obventions profits and emoluments whatsoever thereunto belonging or appertaining or accepted reputed or known as part or parcel or member thereof to hold unto G. Howard and A. M. Wigram and their heirs, subject to certain life interests therein which had since determined, to the use of J. N. Hayley during his life and from and after his death to the use of all or such one or more exclusively of the others or other of his children as he should by deed or will appoint and in default of and subject to any such appointment to the uses therein mentioned. The settlement contained a proviso that G. Howard and A. M. Wigram and the survivor of them or other the trustees or trustee for the time being thereof should be trustees of the deed for the purposes of the Settled Land Act, 1882, and the Acts extending the same and that a sole trustee for the time being thereof should be competent to act for all the purposes of the said Act including the receipt of capital money.

By a deed dated January 30, 1899, J. N. Hayley for the considerations therein mentioned assigned his life interest in the premises granted by the deed of July 3, 1893, to Walter Reginald Collins.

W. R. Collins died on June 13, 1905, having by his will, dated December 24, 1890, devised and bequeathed all his real and personal estate and effects to his wife Jemima Mary and Frank Clarke Strick upon the trusts therein mentioned and having appointed them executrix and executor thereof.

In 1922 Captain Herbert Charles Curteis, who was the owner of the lands at Wartling upon which certain of the tithe rentcharges settled by the deed of July 3, 1893, were charged, in exercise of the power given him by s. 3 of the Tithe Act, 1918, applied to the Ministry of Agriculture and Fisheries for the redemption of two of these rentcharges amounting to 48*l.* 10*s.* 8*d.* and 5*s.* respectively, and for the determination by the minister of the amount of the consideration money payable in respect of such rentcharges.

On August 25, 1922, the Secretary of the Ministry wrote to W. Cox, the solicitor for Mrs. Collins and Strick, informing him of Captain Curteis's application, and stating that it was proposed to order such redemption in consideration of the sum of 699*l.* 4*s.* 10*d.* and 3*l.* 14*s.* 9*d.* respectively, and asking whether the owners of the rentcharges agreed.

On August 30, 1922, Cox in reply wrote stating that his clients agreed.

On September 20, 1922, Mrs. Collins and Strick signed a form of consent, which had been sent to them by the Ministry to the payment of the redemption money "to George Howard the surviving trustee of the deed of July 3, 1893, and as such entitled to give a receipt for the same."

On October 20, 1922, W. Cox wrote to the Secretary of the Ministry stating that if the consent of September 20, 1922, had not been actually carried into effect and the 702*l.* 19*s.* 7*d.* paid over to G. Howard, his clients were desirous of revoking it in order that the money might be paid into Court, under s. 9 of the Tithe Act, 1846.

On November 1, 1922, the Secretary of the Ministry in compliance with that letter wrote to Captain Curteis requesting him to pay the redemption money into Court.

Accordingly on November 25, 1922, Captain Curteis paid the money into Court as requested, which was placed to

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the credit of an account intituled: "Ex parte Ministry of Agriculture and Fisheries and the owner of the Impropriate tithe rentcharge of 48*l.* 15*s.* 8*d.* charged on certain lands by the Wartling (Sussex) Tithe Apportionment Tithe Redemption, 35,209."

On February 12, 1923, Mrs. Collins and Strick took out an originating summons for an order that the 702*l.* 19*s.* 7*d.* in Court might be invested and the income therefrom paid to the applicants or the survivor of them as and when received during the life of J. N. Hayley.

The summons was headed "In the matter of" the above account, and to it G. Howard and J. N. Hayley were made respondents.

On July 25, 1923, the summons was amended pursuant to an order of the master, dated July 18, 1923, by adding Captain Curteis as a respondent.

On January 23, 1924, the summons was heard by P. O. Lawrence J., who made the order asked for, and, following the decision of Neville J. in *In re Graham-Wigan* (1), by which he considered himself bound, directed that Captain Curteis should pay the costs of the application.

Captain Curteis appealed, and asked that the order should be discharged, so far as it directed the payment by him of costs.

The appeal was heard on March 10, 1924.

J. E. Harman for the appellant. Although the Tithe Acts contain no directions as to costs the Court has jurisdiction to deal with them under s. 5 of the Judicature Act, 1890.

By s. 9 of the Tithe Act, 1846, the person for the time being entitled to a rentcharge for only a limited interest therein has an option to require the redemption money to be paid either into Court or to a trustee capable of giving a receipt for it. Here the respondents were at first willing, and requested that the money should be paid to the trustee of the settlement, but subsequently changed their minds and required that it should be paid into Court. It is submitted

(1) [1911] 2 Ch. 438.

that the respondents having once exercised their option there is no power in the Acts which enables them afterwards to revoke or alter the exercise of that option.

The Tithe Act, 1918, which by s. 4 introduces a new method for the ascertainment of compensation for redemption of tithe rentcharge, by Sch. I, para. 2, provides that: "The compensation for redemption shall be such a sum as in the opinion of the Board is sufficient, after the payment of the cost of investment," etc. The Legislature has therefore provided that the costs of investment should be included in the compensation money.

The analogy of the Lands Clauses Consolidation Act, 1845, has no application to the present case. That Act contains an express provision (s. 80) dealing with the costs of investment of funds paid into Court under the Act.

[POLLOCK M.R. The whole scheme of that Act seems to be different from that of the Tithe Act.]

There is no option given by that Act as to whom the compensation money is to be paid.

In re Graham-Wigan (1) has no application to the present case. That was a decision under the Extraordinary Tithe Redemption Act, 1886, which by s. 5 required that the money should be paid into Court. The Act contained no option such as is given by s. 9 of the Act of 1846, which distinguishes that case from the present. Here the option has been exercised by requiring the money to be paid to the trustee of the settlement, and there is no power to revoke or alter it.

In the circumstances of the case, it is submitted that the appellant ought not to be required to pay the costs of the investment of the money in Court.

W. M. Hunt for the respondents Mrs. Collins and Strick. This is a compulsory acquisition of these respondents' rentcharges. Formerly under s. 5 of the Act of 1846 their consent to the redemption would have been necessary. That is now rendered unnecessary by s. 3 of the Act of 1918.

It cannot, it is submitted, be unreasonable that the owners of a tithe rentcharge should exercise the option given them

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by the Legislature of requiring the redemption money to be paid into Court. As the appellant has put the machinery of the Tithe Acts into operation he ought to pay the costs of the investment of the compensation money: *In re Graham-Wigan*. (1) The mere fact that these respondents first requested that the money to be paid to the trustee of the settlement does not prevent them from subsequently exercising their option by requesting that the money should be paid into Court, provided that that request is not then too late. Under s. 6 of the Act of 1846 the Commissioners (now the Board of Agriculture and Fisheries) have to see that the money is paid to the right person, and their certificate has been given on the footing that it was properly paid into Court. Nothing has happened in this case, it is submitted, to deprive these respondents of the option given them by s. 9 of the Act of 1846. The decision of P. O. Lawrence J. as to costs was therefore right and should be affirmed.

H. A. Hind for the respondent Howard, the trustee of the settlement, and the respondent Hayley, the tenant for life. As the respondent Howard was willing to receive the money, it is submitted that any increase in the costs occasioned by requiring the money to be paid into Court, if not ordered to be paid by the appellant, ought to fall upon income and not upon capital.

W. M. Hunt. All that has been done by the respondents Mrs. Collins and Strick has been done to protect the capital, and therefore if the appeal succeeds costs ought to come out of capital.

POLLOCK M.R. We think that this appeal should be allowed, and as the matter is of some importance, and we are differing with the learned judge in the Court below, it is necessary to state our reasons more fully than we should otherwise have done.

[The Master of the Rolls, after stating the introductory facts, continued:] Captain Curteis exercised the powers given to him by s. 3 of the Act of 1918, which provides that

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there shall be what is called a compulsory redemption of rentcharges without the consent of the owner of the rentcharge, unless the Board of Agriculture and Fisheries in any exceptional circumstances direct for some reasons good and sufficient that there shall not be that compulsory redemption. It is important, however, to point out that not only since the Tithe Act, 1846, but I think previously, the system of redemption of tithe and tithe rentcharge has been made possible, and indeed encouraged, by successive Acts passed by the Legislature, and the powers which are now given by s. 3 of the Act of 1918 are only of a piece with a continuous practice of the Legislature over a period of something like eighty or ninety years; seventy years, at any rate. The Tithe Acts cover a very long period, from 1836 right down to 1918, and the Act of 1918 is to be cited together with the other Tithe Acts as the Tithe Acts, 1836 to 1918. It is fitted into the scheme which has been established, as I say, over such a long period of time. Under s. 9 of the Act of 1846 as and when the sum to be paid by way of redemption has been ascertained, then where as in this case there is a limited owner, a tenant for life, the money may be paid either into Court or it may be paid to the trustees acting under a settlement, according to the option exercised by a person for the time being entitled as aforesaid. Now the sum so to be paid in respect of this tithe rentcharge that was to be redeemed was determined in accordance with the system of the statutes, and it became necessary therefore to ascertain whether the money was to be paid to the person who was quite competent to receive it—namely, the surviving trustee, George Howard—or should be paid into Court. It is here important to observe that George Howard had a special power given to him by the terms of the settlement of 1893. That settlement provided that a sole trustee for the time being of the deed should be competent to act for all the purposes of the Settled Land Acts, including the receipt of capital money. George Howard, therefore, was armed with and possessed of the power as sole trustee under the Acts and under the settlement to give

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a discharge for this sum paid into his hands, and he was in every sense a fit and proper person to receive the money. On September 20, 1922, Mrs. Collins and Strick, who were the right persons to give their consent, did give their consent to the moneys being paid direct to George Howard. A month later, after intervening letters had purported to carry out the consent and option so exercised, the suggestion was made by W. Cox, who was then acting as solicitor for Mrs. Collins and Strick, that instead of the money being paid over to Howard it should be paid into Court. Now at that time the option given by s. 9 of the Act of 1846 had already been exercised a month previously, and so far as I know there is no power at all to revoke or alter the exercise of an option when once that option has been exercised. Further letters however passed, and the Ministry of Agriculture and Fisheries apparently assented to and adopted the position taken up by Cox, and were prepared to have an arrangement made different from that which had been determined by the notice and election of September 20, 1922. Exactly what their powers are in the matter is not very clear, and it is not necessary at all for us to consider them. At any rate, they required Captain Curteis to pay the money into Court. This he accordingly did, and the matter then came before P. O. Lawrence J. upon an application by Mrs. Collins and Strick that the landowner, Captain Curteis, should pay not only the money which had been certified as the right sum for him to pay by way of redemption of the tithe rentcharge, but the costs of the application for investment. On the hearing of the application the attention of P. O. Lawrence J. was called to *In re Graham-Wigan.* (1) That was a case which arose under the Extraordinary Tithe Redemption Act, 1886, and it was there held by Neville J. that in a case where there had been a redemption of a tithe rentcharge the Court had jurisdiction to deal with the costs, and that they must be paid by the landowner seeking compulsory redemption. The ground of his decision is thus stated by him (2): "It seems to me that the person exercising

(1) [1911] 2 Ch. 438. (2) [1911] 2 Ch. 441.

the compulsory powers should bear the burden of the costs incurred." What I think he is there referring to is the system of the Lands Clauses Act, 1845, under which if an undertaker in exercise of the powers given him by the Act takes compulsorily for his own advantage and for the purpose of the scheme which he is carrying out the land of a landowner, he is, by an express provision of the Act, under an obligation to provide and pay all the costs of and incidental to such compulsory purchase. It is not unimportant, as my learned brother Warrington L.J. has pointed out, to notice that the date of that Act is 1845, and that you find in it an express provision that the person exercising those compulsory powers and taking away certain actual property of the landowner shall pay, and pay to the full, the costs dealt with in the special section. Neville J. appears to have applied that principle, and to have thought that a similar system ought to prevail in the case of tithe redemption, because what are being exercised are certain compulsory powers of redemption.

For the reasons which I have given in the course of the argument I do not think that the two systems of taking land under the Lands Clauses Act and the redeeming of tithes are in pari materia. It seems to me that the whole system of the Tithe Acts, 1836–1918, is to make it possible for the landowner to redeem the tithe, and that for over a series of years, certainly as long as two generations, the Legislature has attached to the nature or quality of a tithe rentcharge the possibility of its being redeemed, in order to carry out the policy of getting rid of a class of property which very often gives rise to difficulty between those who pay and those who receive. It seems to me, therefore, that the incident of the redemption of tithe rentcharge is a right which is favoured and encouraged by the Legislature. I do not think it stands at all in the same position as the compulsory taking of a person's land under the Lands Clauses Act, 1845.

Therefore, for the reasons which I have given, I do not think the decision of Neville J. in *In re Graham-Wigan* (1)

(1) [1911] 2 Ch. 438.

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was right, and if that case had come before this Court on appeal I should have been prepared to say that the principle that he applied was not applicable, and that there certainly was no rule that the owner of the land ought to bear the burden of the costs involved.

It is said, and I think rightly, that there is jurisdiction in the Court to deal with these costs.

Sect. 5 of the Judicature Act, 1890, has been called to our attention, and no doubt under that section the costs of and incident to all proceedings in the Supreme Court are in the discretion of the Court or a judge. Of course the discretion that a judge has to exercise is a judicial discretion. P. O. Lawrence J. felt himself bound by *In re Graham-Wigan* (1), and, as I understand, did not exercise his judicial discretion, but followed what he thought was a principle laid down by Neville J. In my judgment Neville J.'s decision was wrong in that case. There is no such principle as P. O. Lawrence J. felt himself bound by, and therefore the matter is entirely open.

I desire to add this, that inasmuch as s. 5 of the Judicature Act, 1890, gives a discretion in all proceedings I do not wish to go so far as to say that in every case the costs must be borne under any circumstances by the parties who are interested in the money after its amount has been ascertained and it is ready to be paid. It may be that circumstances might arise in which a different order would, in the discretion of the Court, be right, but I am satisfied that there is no such rule as P. O. Lawrence J. purported to act upon and that, generally speaking, the rule ought to be the other way, because the landowner having had the sum to be paid ascertained is not really interested in its ultimate devolution, and he ought to be entitled to get rid of the money in the simplest way possible. If he pays it into Court at the request of those who are interested in it, or if a further burden is put upon him, it seems inappropriate that he should be called upon to pay those costs. In the particular case before us the option was in fact exercised, for the money was to be

(1) [1911] 2 Ch. 438.

paid to George Howard, who was a fit and proper person to receive it, and any other subsequent alteration in that course that was made was something which added a burden for which Captain Curteis ought not to pay. Under these circumstances the appeal must be allowed with costs, and I think Captain Curteis is entitled to his costs here and below. With regard to the costs and the question of how they are to be dealt with on the point that was put to us, whether the costs ought to be paid out of capital, my brother Warrington L.J. has drawn up an order which will deal with all the costs of the case in order that there may be no doubt in a matter which obviously raises one or two questions, not only between the parties, but whether the costs should be paid out of capital or out of income.

WARRINGTON L.J. I am of the same opinion. The learned judge decided the point which came before him on the assumption that the decision of Neville J. in *In re Graham-Wigan* (1) had laid down a principle which ought to be followed in cases like the present, and Neville J. himself purported to act on what he thought was a general principle governing the mode in which the Court ought to deal with costs in such cases.

The supposed principle is thus stated by Neville J. (2): "I should have thought on principle that, where powers are given to a person to take property from another compulsorily, the Legislature would have intended to protect the person against whom the compulsory powers were exercised as far as possible. If this were not so in the case of the present statute"—that is, the Extraordinary Tithe Redemption Act, 1886—"the burden of costs would fall upon the tithe owner who happened to be under any disability every time any tithe was redeemed, and having regard to the fact that the sums payable on redemption of tithe are often very small, the burden so imposed on the tithe owner might be very great. It seems to me that the person exercising the compulsory powers should bear the burden of the costs

(1) [1911] 2 Ch. 438. (2) [1911] 2 Ch. 438, 441.

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incurred. I hold, therefore, that in a case like the present, of an application for the investment of money paid into Court in redemption of compulsory tithe, the costs ought to be paid by the landowner as the person who is exercising compulsory powers." Then he adds: "It is curious that there is no reported decision on the point. It is clearly a case in which a definite rule ought to be established, and though it is extremely hard on the parties that so small a matter should be taken to the Court of Appeal, I should be glad of their decision, and will grant leave to appeal if desired." It is plain from that judgment that Neville J., so far as he was concerned, did intend to lay down a general rule.

I will now see whether in the present case there is any such general rule applicable. With regard to the compulsory purchase of land under the Lands Clauses Acts the Acts themselves make provision for the costs of the investment of the proceeds of sale when paid into Court, and for dealing with that fund until it becomes payable to a person absolutely entitled. In the case of the Tithe Act, 1846, the Act by s. 9 makes provisions whereby in the case of persons under disability the money may be paid either into Court or to a trustee capable of giving receipts, at the option of the person entitled to the tithe rentcharge. That I think clearly on the true construction means at the option of the person who if the redemption had not taken place would be entitled at the moment to receive the rentcharge, and the statute makes no provision, such as is contained in the nearly contemporaneous Lands Clauses Consolidation Act, 1845, for the payment by the landowner of the costs.

At the time when the Act of 1846 was passed the consent of the tithe owner was necessary to the redemption of tithe, but in the Tithe Act of 1918 it was provided by s. 3, reading it shortly: "A tithe rentcharge . . . . shall, on the application of the owner of the land charged therewith, and without the consent of the owner of the rentcharge, be directed by the Board of Agriculture and Fisheries to be redeemed under and in accordance with the Tithe Acts, 1836 to 1891, as amended by this Act." The result seems to be that the landowner

who is liable to pay the tithe shall, subject to provisions for the protection of the tithe owner, be entitled to redeem. This is not a compulsory power to be exercised, but a right conferred on the person subject to the charge with a corresponding statutory liability on the part of the person entitled to the rentcharge as an incident of the particular class of property which he holds.

That being so, in my opinion, this is not a case in which the Court ought to apply any supposed principle applicable in the case of the compulsory purchase of land. I doubt whether there is any principle applying in general even to all cases where a person acquires land compulsorily. There is a rule with regard to cases under the Lands Clauses Consolidation Act, but that is an express statutory rule. If there is any principle applying to cases not covered by that statutory rule it is contained in the Judicature Act, 1890, s. 5, which is in these terms: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." In my opinion that provision is exactly applicable to the present case, and the costs here were in the discretion of the judge unfettered by any such general principle as he seems to have thought he was governed by.

If then the costs were in the discretion of the judge how ought he to have dealt with them in the present case? Except for this question whether or not the landowner was to be required to pay the costs of the application to the Court there would have been no necessity for bringing him before the Court at all. He was brought there simply and solely for the purpose of raising the question whether the Court ought to order him to pay the costs, and when one looks at the facts of the case and treats it as a matter of

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discretion I think it is one in which the discretion ought certainly to have been exercised in his favour.

What was the position? The applicants were the executors of a person who had bought the life interest in this tithe rentcharge from the tenant for life. The tenant for life was entitled to receive the tithe rentcharge by virtue of a deed of settlement under which the trustees were appointed trustees for the purposes of the Settled Land Acts, and who were therefore entitled to receive the capital moneys, and under which provision was expressly made that one trustee should be entitled to give a receipt for the same. It happens at the present moment that there is only one trustee, the other trustee having died. In the first instance the present applicants consented to the payment of the redemption money, which is about 700*l.*, to the trustee of the settlement, and in my opinion they were rightly advised in so doing. That seems to have expressed exactly what it was their right to have done under the terms of the deed subject to which they had bought this property. But they afterwards changed their minds and purported to withdraw the consent to the payment to the trustee, and to require under s. 9 of the Tithe Act, 1846, that the money should be paid into Court. Whether they were entitled to withdraw that consent without consulting the landowner, which is what they in fact did, is a matter on which I need not express an opinion. All I say is that if it should become material to decide that point it might raise a very serious question, but I think at all events that the withdrawal of the consent once given becomes very material for determining the way in which the discretion of the Court should be exercised. I think the learned judge ought to have exercised his discretion by holding that the respondent Captain Curteis, who had been brought before the Court for the purpose of making him liable for costs, was not liable, and accordingly to have dismissed the application so far as he was concerned, and to have ordered the applicants to pay the costs of it.

I think, therefore, that the order of the learned judge so far as costs are concerned must be set aside; that the

applicants should pay the costs of the landowner here and below; and as to the other costs in the Court below the applicants should have only such costs as would have been incurred if the matter had been dealt with in chambers without the liability of the landowner to pay costs being raised; that those costs—namely, the costs of the Court below—should be chambers costs only, and that the costs of Howard and Hayley in the Court below should be paid out of the corpus of the fund; in this Court the applicants should pay the costs of Howard and Hayley. I do not think that this small fund ought to be subjected to any further costs occasioned by an appeal which has been brought about by the mistaken view of the applicants.

ATKIN L.J. I agree. It appears to me that under the Tithe Act, 1846, when redemption money had once been paid into Court there was no power in the Court to award costs against either the landowner or the tithe owner until the Judicature Act, 1890, where the power is given under s. 5. I think that that is made quite plain by *In re Mills' Estate.* (1) Under the Judicature Act, 1890, costs are in the discretion of the Court.

The learned judge in exercising his discretion under the Act has found himself bound by a particular principle laid down by Neville J. in *In re Graham-Wigan.* (2) I am not prepared to say that the principle, so laid down, was correct even when applied to cases where property is taken compulsorily under Act of Parliament. As he there points out, Acts of Parliament have sometimes provided that the costs should be paid by the taker of the property, sometimes that the costs of dealing with the money paid into Court should be borne by the person to whom the money belonged, and sometimes they have made no provision whatever. It appears to me very difficult to draw any principle with certainty from the provisions of the Acts of Parliament, or to say that there is any principle of justice which requires that in all cases the person exercising the compulsory

(1) (1886) 34 Ch. D. 24. (2) [1911] 2 Ch. 438.

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powers shall have to pay the costs of providing for the disposition of the money when once the money has been found by the person taking the property; but even if that were so it appears to me that proceedings in tithe redemption differ from a compulsory taking of property to which the person taking it had no right except under the powers given him by a particular statute of acquiring the land or property for particular purposes. I think Mr. Hunt is quite justified in saying that the redemption in this case is the exercise of a compulsory power; but on the other hand it has to be remembered that the person exercising that power was under an obligation to make an annual money payment which was a rentcharge, that is to say, a payment charged upon his land, and the right that is given him is a mere right to commute that money payment for a capital sum, a right with which we are quite familiar in this Court in other circumstances; as for example the power of redeeming weekly payments made under the Workmen's Compensation Act, 1906, for a lump sum. I see no reason again in justice or equity why under all circumstances the person who has redeemed a rentcharge should have to pay the costs of determining the final disposition of the sum of money which he has paid under his statutory right to redeem. I think it would be very unfortunate to fetter what the Act of Parliament has called the discretion of the judge by laying down any rule which would purport to operate in all cases.

In this particular case the learned judge when exercising the general discretion given him has considered himself bound to follow a particular decision, and to adopt a particular principle of law. That failing, we must hold that he has not exercised his discretion, and we have to exercise it. That being so, it seems to me that it would be very unfair to make the landowner pay the costs under the circumstances which have been stated to the Court. It is plain that the tithe owner has an option to direct the money to be paid to the trustee. To my mind there is very strong ground for contending—I will not put it higher than that, because I do not propose to decide the point—that the tithe owners

had irrevocably exercised their option. Personally I am at a loss to understand under what powers the Ministry of Agriculture purported to direct to whom the money was to be paid. To my mind they have no power to determine who the true owner of the tithe is, or who the limited owner of the tithe is, or who the trustee is to whom these moneys can be paid, although they have the right to withhold their final certificate until they are satisfied that the money has been paid to the right person. In this particular case it seems to me that the tithe owners have brought the trouble entirely upon themselves. All the expense which has been incurred in this matter is due to the fact that they changed their minds, and under these circumstances I think that the right view is that they should pay the costs of the landowner in respect of this matter, and I agree with the order as to costs which has been mentioned by Warrington L.J.

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Appeal as to costs allowed.

Solicitors for appellant: *Kingsford, Dorman & Co.*

Solicitors for respondents Mrs. Collins and Strick: *Botterell & Roche, for Cox & David, Swansea.*

Solicitors for respondents Howard and Hayley: *Crawley, Arnold & Co.*

W. I. C.

Applied. BOYT *v.* BOYT. [1948] 2 All E.R. 436.

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SHIPMAN *v.* SHIPMAN.

[1924. S. 289.]

Husband and Wife—Wife's separate Property—Dwelling House—Protection and Security—Right to exclude Husband from matrimonial Home—Husband's Misconduct—Cruelty—Interim Injunction—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 12.

Sect. 12 of the Married Women's Property Act, 1882, provides that "every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort." In an action founded upon this section a wife sought an injunction to restrain her husband from entering into or otherwise trespassing upon a house, which formed the matrimonial home, and was her own separate property. There was evidence that the conduct of the husband and his cruelty to his wife was such that the family, consisting of the wife and her two children by a former husband, could not possibly live together, and that unless the husband were restrained from entering the house its value to the wife would be seriously diminished, and she would be obliged to sell it:—

Held, by the Court of Appeal, affirming the decision of Russell J., that an interim injunction ought to be granted restraining the husband until trial of the action from entering into or upon the house or otherwise interfering with the plaintiff's possession thereof.

APPEAL by the defendant, the plaintiff's husband, from the decision of Russell J., whereby he granted an injunction to restrain the defendant until the trial or further order from entering the plaintiff's house, which was her separate property, or from otherwise trespassing thereon.

The plaintiff was married to the defendant on September 9, 1920. There was no issue of the marriage. At the time of the marriage the plaintiff was a widow with two children, a girl, now aged seventeen, and a boy of thirteen. The defendant after the marriage lived with the plaintiff at a house belonging to her, where she carried on the business of a newsagent, stationer, confectioner and tobacconist, by which she had supported herself and her children. In March, 1921, she sold this business and went to live at

Windsor, where she bought a similar business. The defendant went with her to Windsor, and soon afterwards, according to her evidence, he commenced to drink and began to illtreat her. In consequence of his conduct she then sold her business at Windsor and took rooms at Walthamstow. In May, 1923, she bought a freehold house there. When living at Windsor she lent him money to enable him to procure a situation, which he left in about a fortnight and returned to Windsor. In April, 1923, he induced the plaintiff to lend him 160*l.* to fit out and stock a shop at Walthamstow, but the business failed and the stock had to be sold at a sacrifice. She further alleged that the defendant had illtreated and abused her and on several occasions had struck her. His conduct towards her was such that it was impossible for her to live with him.

The defendant denied that he had illtreated the plaintiff and said that he had always been a moderate drinker and had rarely been the worse for drink. If he had struck the defendant it had only been in self-defence. The plaintiff in reply said that if the defendant was not restrained by the Court from coming to her house she would be obliged to sell it and live on the proceeds.

The plaintiff's daughter corroborated her evidence and said that the defendant's conduct was such that she could not continue to live with her mother whom she helped to support.

The plaintiff's evidence was further corroborated by that of a neighbour at Windsor, who said that he had often seen the defendant the worse for drink, and that he was continually making a disturbance with the plaintiff and knocking her about.

Russell J. granted an interlocutory injunction restraining the defendant on the grounds of his bad conduct from entering the plaintiff's house at Walthamstow. He was satisfied that the wife had every just cause of complaint. He was told that the wife hoped to make a living out of the house by taking lodgers, but it was impossible for her to do so if the husband was allowed to continue to go there. If the husband were not restrained from going to the house its

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value to the wife would be diminished. On the other hand the order asked for would amount to a judicial separation. In *Symonds* v. *Hallett* (1) Cotton L.J., though affirming an injunction which had been granted, expressed his opinion in language which showed that he was disinclined to accept the view that there was jurisdiction to make an order which would amount to a decree for judicial separation. In order to succeed under s. 12 of the Married Women's Property Act, 1882, the wife must show that the order would be for the protection and security of her property. His Lordship was satisfied that the action was brought for that purpose, and that the value of the property would be increased if the defendant were excluded from it. He therefore granted an injunction, but suggested that as he had some difficulty in deciding the case his order should be appealed from.

The defendant appealed.

The appeal was heard on March 19, 1924.

A. R. Taylour for the appellant. The learned judge has put too wide a construction upon s. 12. That section was intended to be merely declaratory of the previously existing law on the subject (*Reg.* v. *Lord Mayor of London*). (2) The power granted by s. 12 was a power to protect the wife's property and not to put an end to the relation of husband and wife.

In *Green* v. *Green* (3) no doubt an order was made, but there had been a separation there, which distinguished it from the present case. That was followed in *Wood* v. *Wood*. (4) In *Symonds* v. *Hallett* (1) divorce proceedings were pending, and the Court thought it was more convenient to preserve the status quo until the hearing. In *Weldon* v. *De Bathe* (5) Cotton L.J. repeated the warning which he had expressed in *Symonds* v. *Hallett*. (1) In *Gaynor* v. *Gaynor* (6) the Court declined to make any order restraining the husband from entering a house.

(1) (1883) 24 Ch. D. 346.
(2) (1886) 16 Q. B. D. 772.
(3) (1840) 5 Hare, 400 n.
(4) (1871) 19 W. R. 1049.
(5) (1884) 14 Q. B. D. 339.
(6) [1901] 1 I. R. 217.

[He also referred to Lush on Husband and Wife, 3rd ed., 516, 517; Eversley on Domestic Relations, 3rd ed., 416; and 1 White and Tudor's Leading Cases (1910), 8th ed., 748.]

G. D. Johnston for the respondent was not called upon.

POLLOCK M.R. I think this appeal must be dismissed. The parties were married in 1920, and from the story of their married life as told in the affidavits there is no doubt the husband has been guilty of misbehaviour. The wife has purchased the house in which she has been living with her children and her husband. The charge made by her against him is that he has given way to drinking; that he is not industrious, etc.; and I think there is some solid ground for this, even if it be exaggerated, because the husband says that he was "rarely" the worse for drink, and he admits that he struck his wife, though he says it was in self-defence. At any rate it looks as if he had rendered their life together very difficult. The wife apparently provided a business for him to go to, and she says that by his mismanagement the business failed and came to an end. Since the failure he has been unemployed and is receiving unemployment pay. His conduct to the wife is complained of by her, and she says it is impossible for her to live with him, and her evidence is corroborated by her daughter and a neighbour. Under the circumstances, although no proceedings have been taken before a magistrate for judicial separation on the ground of violence, and no petition has been presented, I think there is evidence that the husband has been guilty of grave misconduct.

This matter comes before us on an order made by Russell J. upon an interlocutory application before trial. The action is brought for a declaration that the house is part of the wife's separate estate, and Russell J. has made an order that the husband be restrained until judgment or further order from entering the house. Russell J. put into operation s. 12 of the Married Women's Property Act, 1882. That section is in wide terms. [His Lordship read it and continued:] Russell J. has decided that, for

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the purpose of protecting the house, it was right to grant the injunction. There may be some confusion of thought as to why these rights have been given to a wife, because husband and wife stand in very special relationship to each other, and one must not forget, when looking at s. 12, that husband and wife have a duty to live together, and this is merely statute law, which gives relief in certain unhappy cases, and I do not wish to appear to overlook the paramount duty of spouses to live together, if possible. But here the case is one in which the injunction was asked for on the ground of protection of the wife's property and was granted only until the trial of the action. It is not a final adjudication, it is only an order to keep the matter in statu quo. On the authorities, in *Green* v. *Green* (1) an injunction was granted enforcing the rights of a wife as regards her separate property. In *Wood* v. *Wood* (2) an injunction was granted in order to carry out the terms of a contract by which the wife was installed as manageress of an hotel, and the husband was restrained from interfering with the business. In *Symonds* v. *Hallett* (3) an interim injunction was granted against the husband to prevent him from invading a leasehold house which had been settled on the wife. Without going any further, it is quite clear that the Courts have interfered to protect the separate property of a wife, and still more should this be done since the passing of the Married Women's Property Act, 1882. But I wish to associate myself with a caution which was expressed by Cotton L.J. in *Symonds* v. *Hallett* (4), where he said: "To say that she is a feme sole is a mere hypothesis and an imagination, because she has a husband, though as regards property she is to be considered as a feme sole. Expressions have been used that she is entitled to be there in all respects as a feme sole and to be protected against her husband's acts as if he were a stranger. That is very true as regards the property. But is the husband to be considered a stranger because the property is vested in her for her separate use? That is a

(1) 5 Hare, 400 n.
(2) 19 W. R. 1049.
(3) 24 Ch. D. 346.
(4) 24 Ch. D. 351.

point which those who assert that the husband is to be considered a stranger must prove." That was afterwards reaffirmed in *Weldon* v. *de Bathe* (1), and I think it correctly states the doctrine of a Court of equity that while protecting the property of a wife as a proper subject for protection, we must also regard the duties of spouses to each other. There is, however, in my opinion, evidence here of conduct by the husband which would justify the wife in resisting a suit for restitution of conjugal rights. She is in a position to defend herself in matrimonial proceedings. Under those circumstances, I think that Russell J. while not disregarding the rights of the husband was right in granting an injunction for the security of the wife's property until trial, under the terms of s. 12, and I think that the order for an injunction should be affirmed.

ATKIN L.J. I agree; and as this is a matter of great importance, and as my reasons are not altogether identical with those of the learned judge, I will express them in a few words. It is a remarkable thing that if a wife has, under the Act of 1882, the right which is claimed here, there is no correlative right given to the husband. Sect. 12 is very clear. [His Lordship read it.] Applying that section, the learned judge granted an injunction, finding that the husband living in the house would diminish its value. That is a view of the facts which I am not prepared to accept. I think there is no evidence that the value of the house would be materially diminished. There was no evidence that the taking of lodgers was prevented by the husband's presence. It was contended before us for the husband that those were the only circumstances under which the Act would apply. I do not agree. The rights given to a wife are much wider. She was intended to have all the rights and all the remedies that every owner of property was intended to have, including a right to exclusive possession, and the question is whether she has those rights in respect of the matrimonial home against her husband. That is a

(1) 14 Q. B. D. 339.

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matter of public importance. It is the duty of husband and wife to live together, and if one or other wilfully absents himself, that is a matrimonial offence, and if a wife, without good cause, seeks to exclude her husband from the matrimonial home, she seeks to get the Court to enable her to evade a duty. Therefore I should be reluctant to lay down a rule that a wife can treat her husband in the same way as a stranger. So perhaps, in normal circumstances, the husband may have a right to enter the matrimonial home for duties which it is not only his right to demand but his duty to render, and under these circumstances, the husband would be guilty of no misconduct if his innocent presence did some damage, and I think the wife would have no claim. But such a right of the husband would be limited to being on the premises to enjoy the matrimonial consortium, and if the husband were guilty of conduct which would be a ground for a petition by the wife, or would enable her to resist a petition for restitution of conjugal rights, the effect would be that he would forfeit the privileged position he held previously and would be relegated to the position of any other person. In no circumstances would he have the right to interfere with the rights of the wife in a way detrimental to her separate property.

In the present case there was evidence of cruelty and drunkenness, which was corroborated by the daughter, and by the neighbours, and there were even admissions by the husband that he was sometimes drunk, and that he struck his wife. There is evidence before the Court that if the wife were compelled to live with her husband she might be obliged to give up her property altogether, or to be exposed to his cruelty and violence. In these circumstances I think the right course was to protect her and I agree that the appeal should be dismissed.

SARGANT L.J. The words of s. 12 are very clear, and in terms cover this case, and an injunction against a stranger would be granted as a matter of course. But the special position of husband and wife in relation to their matrimonial

duties has to be considered, and must not be forgotten. As Cotton L.J. says in *Symonds* v. *Hallett* (1) in the passage read by the Master of the Rolls, her rights of property must not make her husband a stranger to her. The remedy invoked here is a special remedy and a discretionary remedy, and I doubt whether the Court should grant an injunction if it were sought from mere caprice on the part of the wife. But this does not appear to be so here. The husband's conduct has been such that he has apparently lost the right to the matrimonial consortium, and therefore he is in no better position than a stranger, and it follows that the injunction was rightly granted.

Solicitors for the appellant: *Bircham & Co.*

Solicitors for the respondent: *Cartwright, Cunningham & Co.*

G. A. S.

LUXARDO *v.* PUBLIC TRUSTEE.

[1921. L. 3223.]

Treaty of Peace—Construction—Liquidation—Treaty of Peace with Austria, 1919, *Art.* 206, *Art.* 249 *and Annex—Treaty of Peace* (*Austria*) *Order*, 1920.

The plaintiffs were the receivers of the Austro-Hungarian Bank appointed by the Reparations Commission under art. 206 of the Treaty of Peace with Austria, and entrusted with the duty of liquidating the bank for the purpose of distributing the liability on the currency notes of the bank among the several States among which the territory of the former Austro-Hungarian monarchy had been divided. Art. 249 of that Treaty provided that "subject to any contrary stipulation" in the Treaty the British Government might retain and liquidate the property in this country of "nationals of the former Austrian Empire" (which expression, as the Court found, included the Austro-Hungarian Bank), and charge it with the payment of claims by British nationals in respect of (inter alia) debts due to them by Austrian nationals. By the same article Austria undertook to compensate her own nationals for the retention of and charge upon their property. The defendants were the Custodian of Enemy Property in this country and the Administrator appointed by Order in Council to liquidate the property of Austrian nationals in this country and administer the above-mentioned charge.

(1) 24 Ch. D. 346.

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The plaintiffs claimed that art. 206 was a "contrary stipulation" within the meaning of art. 249, that the property of the bank in this country was consequently not subject to the charge, and that they and not the defendants were entitled to administer that property:—

Held, affirming the judgment of Romer J., that there was no inconsistency between the two articles, which dealt with different subject matters, the only effect of art. 249 upon the liquidation under art. 206 being to replace the assets of Austrian nationals in this country by assets of equal value in Austria if the Austrian Government carried out its undertaking, and that the action must be dismissed.

APPEAL from a judgment of Romer J. (1)

This action raised the question whether the property in this country belonging to the Austro-Hungarian Bank at the dates of the coming into force of the Treaty of Peace with Austria, July 16, 1920, and of the Treaty of Peace with Hungary, July 26, 1921, respectively, were subject to the provisions of art. 249 (*b*) of the Treaty of Peace with Austria and to the corresponding provisions of the Treaty of Peace with Hungary.

By art. 249, which was in Sect. IV. of Part X., the Part being headed by the words "Economic Clauses," and Sect. IV. by the words "Property, Rights and Interests," it was provided: "(*b*) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Austrian Empire, or companies controlled by them, and are within the territories, colonies, possessions, and protectorates of such Powers (including territories ceded to them by the present Treaty) or are under the control of those Powers. The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the owner shall not be able to dispose of such property rights or interests, nor to subject them to any charge without the consent of that State."

"(*j*) Austria undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States."

(1) [1924] 1 Ch. 1.

By the annex to Sect. IV., cl. 4 : " All property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire, or debts owing to them by Austrian nationals, and with payment of claims growing out of acts committed by the former Austro-Hungarian Government or by Austrian authorities since July 28, 1914, and before that Allied or Associated Power entered into the war. . . . . They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied."

By the Treaty of Peace (Austria) Order, 1920, it was provided that the sections of the Treaty set out in the Schedule to the Order (which included art. 249 and the annex to Sect. IV.) should "have full force and effect as law," and " for the purpose of carrying out the said sections " certain provisions should have effect, amongst which cl. ix. created a charge upon the property in the terms specified in cl. 4 of the above-mentioned annex.

Art. 206 of the Treaty, which was in Part IX., headed by the words " Financial Clauses," consisted of fourteen clauses, the first two of which provided that each of the States to which territory of the former Austro-Hungarian monarchy was transferred upon the dismemberment of that monarchy should within two months of the coming into force of the Treaty stamp with its own stamp the currency notes of the Austro-Hungarian Bank found in its territory, and within twelve months from that date should replace the notes so stamped with a new currency of its own. Clauses 3–5

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provided for the transfer of the currency notes so withdrawn from circulation by the substitution of the new currencies to the Reparations Commission. By cl. 6: "The Austro-Hungarian Bank shall be liquidated as from the day succeeding the day of the signature of this Treaty." By cl. 7: "The liquidation shall be conducted by receivers specially appointed for that purpose by the Reparation Commission. In conducting the liquidation of the bank, the receivers shall follow the rules laid down in the statutes or other valid instruments regulating the constitution of the bank, subject, however, to the special provisions of this article." By cl. 8: "The currency notes issued by the bank subsequent to October 27, 1918, shall have a claim on the securities issued by the Austrian and Hungarian Governments, both former and existing, and deposited with the bank by those Governments as security for these notes, but they shall not have a claim on any other assets of the bank." By cl. 9: "The currency notes issued by the bank on or prior to October 27, 1918, in so far as they are entitled to rank at all in conformity with this article, shall all rank equally as claims against all the assets of the bank, other than the Austrian and Hungarian Government securities deposited as security for the various note issues." By cl. 10 the securities deposited as security for the last-mentioned currency notes were to be cancelled so far as they represented notes converted by the several States by the substitution of the new currencies. By cl. 11 the remainder of the securities so deposited as security for the notes issued on or prior to October 27, 1918, were to be retained as security for such of the notes of those issues as were on June 15, 1919, outside the limits of the former Austro-Hungarian monarchy, and which are presented to the receivers of the bank through the Government of the country in which they are held.

The plaintiffs were the receivers of the Austro-Hungarian Bank appointed by the Reparations Commission under art. 206 of the Treaty of Peace with Austria, and art. 189 of the Treaty of Peace with Hungary.

The bank was a corporation created by or incorporated

under the laws of the former Austro-Hungarian monarchy, and conducted the banking business thereof, managing the business connected with the national debt of the monarchy and issuing monarchy notes payable on demand. By the articles already mentioned the bank was put into liquidation as from September 11, 1919, the day succeeding the day of the signature of the Treaty of Peace with Austria.

The defendant, the Public Trustee, was Custodian of Enemy Property for England and Wales by virtue of the Trading with the Enemy Amendment Act, 1914, and amending Acts.

The defendant, the Administrator of Austrian Property, was appointed by the Treaty of Peace (Austria) Order, 1920, and amending Orders to control and manage a clearing office and to administer (inter alia) the charge imposed by those Orders upon the property rights and interests, within His Majesty's Dominions or Protectorates, of or belonging to nationals of the former Austrian Empire.

The defendant, the Administrator of Hungarian Property, was appointed by the Treaty of Peace (Hungary) Order, 1921, and amending Orders, and had duties thereunder similar to those lastly before stated in relation to property rights and interests of or belonging to nationals of the former kingdom of Hungary.

The plaintiffs alleged that the bank was possessed of or entitled to extensive property rights and interests in this country which, under the Trading with the Enemy Amendment Act, 1914, and amending Acts or under the above-mentioned Peace Orders, had come into and were in the possession, power, custody or control of the defendants or some or one of them, and the plaintiffs contended that they themselves were entitled to liquidate and administer all such property rights and interests, and to have the same handed over to them and an account of the defendants' dealings therewith, and they claimed a declaration to that effect and also a declaration that such property rights and interests were not subject to retention or liquidation or charge under Sect. IV. of Part X. of the Treaties of Peace with Austria and

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Hungary or either of them and were not subject to the provisions of the said Treaties or Orders in Council or to the charges created under any of them ; and the plaintiffs further claimed delivery up of all such property rights and interests.

The defendants claimed that the property rights and interests in question were subject to liquidation and retention by them and to the charges referred to in Sect. IV. of Part X. of both the Treaties.

At the trial an Austrian legal expert, Dr. Coumont, was called who gave evidence as to the status of the Austro-Hungarian Bank. It appeared that the bank was created in 1878 by two statutes passed concurrently by the respective Parliaments of Austria and Hungary. By those statutes it was provided that the bank should be managed by a board consisting of a governor, two vice-governors, two deputy vice-governors, and twelve directors. The governor was appointed by H.I. and R. Apostolic Majesty on the joint presentation of the Austrian and Hungarian Ministers of Finance ; and otherwise the members of the board were to be in equal numbers of Austrian and Hungarian nationality. But it was also provided that the bank should have its seat in Vienna.

Upon that evidence Romer J. found as a fact that the bank was a national of the former Austrian Empire. He held that there was no inconsistency between art. 249 and art. 206, and that the only effect of the former upon the liquidation of the bank under the latter was to substitute an asset in Austria for an asset in this country. He accordingly dismissed the action.

The plaintiffs appealed.

Sir John Simon K.C., *Maugham K.C.*, *Spence* and *Fachiri* for the appellants. The decision appealed from was wrong upon two grounds. In the first place the charge created under art. 249 has no application to the property of the bank, for the bank was not a national of the former Austrian Empire. It was an anomalous entity which did not fit in with the general scheme of that article. It was not created

by Austrian law, but by that law coupled with Hungarian law. It had a joint nationality, not a double one, and could not be affected by anything that the Austrian Government did or suffered. It could no more be said to be of Austrian nationality than the League of Nations, which is created by the signatures of thirty-two States, could be said to be of British nationality because Great Britain was one of the signatories. Still less could it be said to be a company controlled by nationals of the former Austrian Empire, for by its constitution the board of management was evenly divided between the nationals of the Austrian Empire and those of Hungary, so that it could not be controlled by the nationals of either country. Secondly the powers of retention and liquidation of the property of Austrian nationals in this country conferred by art. 249 are "subject to any contrary stipulations," and art. 206, under which the appellants claim to administer that property, is a contrary stipulation. That article was introduced to deal with the apportionment of the liability on the currency notes of the bank among the seven different countries among whom the dominions of the former Austro-Hungarian monarchy are divided. It provided for a complete liquidation of the bank, which liquidation required special treatment. It was not intended that in the case of the currency note issues which were entitled to rank against the general assets of the bank, the rights of the holders should be whittled down by rendering the assets in this country liable to be taken, with a nominal right of recourse against the Austrian Government under their undertaking of indemnity. Even if the condition as to a "contrary stipulation" did not occur in art. 249 the respondents could not rely upon the charge created under it, upon the wide ground that generalia specialibus non derogant. Such general words as are to be found in that article ought not to be applied to a subject which has already been specially dealt with: *Barker* v. *Edger*. (1)

Sir Douglas Hogg K.C., *Sir Thomas Inskip K.C.* and *Gavin Simonds* for the respondents were not called upon.

(1) [1898] A. C. 748.

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BANKES L.J. This is an appeal from a judgment of Romer J. in an action in which the plaintiffs, who are the receivers of the Austro-Hungarian Bank appointed by the Reparations Commission by virtue of art. 206 of the Treaty of Peace with Austria and of art. 189 of the Treaty of Peace with Hungary, claim as against the defendants, who are the Public Trustee, the Administrator of Austrian property, and the Administrator of Hungarian property, a declaration that the plaintiffs as receivers of the Austro-Hungarian Bank are and have since September 11, 1919, been solely entitled to receive and give valid discharges for and deal with all property rights and interests in the said bank in England and Wales; and secondly, that the defendants are not and never have been entitled to retain or liquidate or charge this property under Sect. IV. of Part IX. of the Treaty of Peace with Austria, or the corresponding section of that with Hungary. The learned judge has dismissed the action on the ground that the plaintiffs are not entitled to either declaration, and with that judgment I entirely concur.

The question depends upon the construction to be placed on certain articles in the Treaty of Peace between the Allied and Associated Powers and Austria which was signed at St. Germain-en-Laye on September 10, 1919. Art. 249 lays down what I may call the general rule to be followed in reference to property in this country which belonged at the date of the coming into force of the Treaty to nationals of the former Austrian Empire or companies controlled by them, and provides that, subject to any contrary stipulations which might be provided for in the Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all such property, and that the liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and that the owner shall not be able to dispose of such property or subject it to any charge without the consent of that State. It is not disputed that if the property to which the plaintiffs claim to be entitled comes within art. 249 it is property which is subject to the charge created

by s. 1, cl. ix., of the Treaty of Peace (Austria) Order, 1920, and the persons entitled to deal with it are the defendants and not the plaintiffs. The scheme was that property of Austrian nationals in this country should be retained here and be subject to a charge in favour of British nationals to whom Austrian nationals were indebted, and to the extent to which such property was retained and dealt with under that section Austria undertook to compensate her nationals for the sale or retention of their property. According to that scheme if the defendants are right the plaintiffs are entitled not to recover the property of the bank in this country, but to receive its exact equivalent from the Austrian Government.

It is contended that the property of the Austro-Hungarian Bank does not fall within art. 249 for two reasons, the first of which is that the bank is not a national of the former Austrian Empire nor a company controlled by nationals of that Empire. It appears from the learned judge's judgment that an Austrian lawyer, Dr. Coumont, was called before him, who stated in his evidence that the bank was strictly speaking neither an Austrian subject nor a Hungarian subject. Later on, when asked what were the determining factors of the nationality of a corporation according to Austrian law, he replied: "When a corporation is called an Austrian corporation the fact is, first it has to be created under Austrian law, then to have its seat in Austria, and therefore to be in its whole person under Austrian law." The learned judge went on to say, as his inference from this evidence: "In the statutes of the bank, to which I was referred, it is expressly provided by para. 2 that the bank has its seat in Vienna. From this it would follow, according to Dr. Coumont, that it was in its whole person under Austrian law and was accordingly of Austrian nationality." Then later on the learned judge said: "I think that Dr. Coumont, in saying that strictly the bank was neither an Austrian subject nor a Hungarian subject, meant no more than this, that its nationality was neither solely Austrian nor solely Hungarian." With that conclusion, in reference to the evidence that the

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learned judge had before him, I entirely agree. I think that the Austro-Hungarian Bank was sufficiently a national of the former Austrian Empire to satisfy the requirements in that behalf of art. 249. Secondly, it is said that the plaintiffs are entitled to succeed because there is a "contrary stipulation" in the Treaty which prevents the application of art. 249. That stipulation, it is said, is to be found in art. 206, which was specially designed to deal with the liquidation of the Austro-Hungarian Bank. I am entirely unable to appreciate that contention. It seems to me that the article was primarily designed to deal with the difficulty of the currency of the dismembered Austro-Hungarian monarchy, so far as that currency consisted of currency notes, and with the distribution of the liability on those notes among the several States that have been carved out of that dismembered monarchy. It is only incidentally that the article deals with the security deposited by the Austrian and Hungarian Governments as security for the notes, and with the liquidation of the bank. The article does not mention any liability of the bank other than the liability on the currency notes, and presumably was intended to deal with that liability alone, and to indicate the extent to which the constituent portions of the Dual Monarchy should be respectively responsible for its discharge. Clauses 6 and 7 of the article no doubt do refer to the liquidation of the bank, but only in connection with the currency notes, and the only assets in this country that the receivers will have to deal with in that connection are the surplus funds, if any, remaining after the defendants have satisfied the claims of the British creditors against the Austrian debtors under art. 249. If that be so I can find nothing in art. 206 that could be said to be a stipulation contrary to the provisions of art. 249. And this construction will not involve any hardship upon the plaintiffs, because, as already stated, they will be entitled to receive from the Austrian Government an exact equivalent of the property which is taken out of their control. For these reasons I think that the decision of the learned judge was correct and that the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The plaintiffs, the receivers acting in the liquidation of the Austro-Hungarian Bank pursuant to art. 206 of the Treaty of St. Germain-en-Laye, claim declarations which would in effect exclude certain assets of the bank in this country from the charge created by the Treaty of Peace (Austria) Order, 1920. By that Order all property belonging to nationals of the former Austrian Empire at the date when the Treaty of Peace with Austria came into force was charged with the payment of amounts due in respect of claims by British nationals. That Order in Council was made for the purpose of giving effect to art. 249 of the Treaty and cl. 4 of the annex thereto. Art. 249 provided that, subject to any contrary stipulations which might be provided for in the Treaty, the Allied and Associated Powers reserved the right to retain and liquidate all property belonging at the date of the coming into force of the Treaty to nationals of the former Austrian Empire or to companies controlled by them. And the annex by cl. 4 provided that the property of nationals of the former Austrian Empire within the territory of any Allied or Associated Power might be charged by that Power with the payment of amounts due in respect of claims by the nationals of that Allied or Associated Power of the nature therein specified. Now the plaintiffs say that the assets of the Austro-Hungarian Bank in England are excluded from that charge for two reasons, (1.) that the Austro-Hungarian Bank is not a national of the former Austrian Empire, and (2.) that the assets of the bank, including those in this country, are dealt with exclusively by another article of the Treaty, art. 206. With regard to the first point I do not think I can usefully add anything to what has been said by Romer J. and Bankes L.J., and it is enough for me to say that I entirely agree with them both. But with regard to the second point I desire to add a few words of my own. Art. 249, which appears in a part of the Treaty headed "Economic Clauses," deals with the property in this country of nationals of the former Austrian Empire, and the liquidation which is there referred to is the liquidation not of the affairs of the nationals in

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question but only of the particular property mentioned. Art. 206 appears in a different part of the Treaty altogether, containing what are called the "Financial Clauses." It deals with what may properly be described as the financial affairs of the several States among which the territory of the former Austro-Hungarian monarchy had been divided. The currency notes issued by the Austro-Hungarian Bank had been distributed as national currency among the different territories forming the Dual Monarchy, and the article provides that the currency notes which were in any of those territories on the coming into force of the Treaty should within two months thereafter be adopted as the temporary currency of the particular State in which they happened to be, and should within twelve months be replaced by that State by a currency of its own. As the States so carved out of the Dual Monarchy respectively assumed under the Treaty a liability for a proportion of the currency notes, it became necessary to provide against what assets the different issues of those notes should be entitled to rank. A distinction was drawn between notes which had been issued before October 27, 1918, and those which were issued after that date. Currency notes which had been issued by the bank subsequently to October 27, 1918, were to have a claim against definite securities deposited with the bank by the Austrian and Hungarian Governments for that purpose, but were to have no claim against the general assets of the bank. On the other hand, the notes issued on or prior to that date were to rank equally as claims against all the assets of the bank other than the securities so specially deposited. Incidentally there are inserted in the article two clauses dealing with the liquidation of the bank. The first of them, cl. 6, is: "The Austro-Hungarian Bank shall be liquidated as from the day succeeding the date of the signature of this Treaty." But if the French version of the Treaty is correct (1) the English translation does not truly represent the effect of that clause. The French version is: "Les opérations de liquidation de la Banque d'Autriche-Hongrie prendront date du lendemain

(1) [In this Treaty the French text is the original.—F. P.]

de la signature du présent Traité." That is to say, if the bank goes into liquidation the liquidation shall commence on a particular date. Similarly cl. 7 provides that for the persons by whom the liquidation, if any, shall be conducted. Neither of those clauses says that there shall be a liquidation of the bank, but only provides for the date at which and the persons by whom it shall be conducted, if there is one. In any view art. 206 does not provide for a general liquidation of all the liabilities of the bank, but only for that of its liability on the currency notes. And if that is so it cannot be regarded as giving to the plaintiffs such an exclusive right to conduct the liquidation as would exclude the operation of art. 249 on the assets of the bank in this country. It seems to me that there is no inconsistency whatever between art. 206 and art. 249. The receivers acting in the liquidation of the bank will take so much of the assets in this country as belong to the bank after satisfying the charge created by the Order in Council, but there is nothing to prevent the charge from taking effect or the liquidation from operating subject to that charge. Moreover, as pointed out by Romer J. the real effect of art. 249 is that the liability of the Austrian Government to compensate its nationals for the assets retained and realized under the charge is, for the purposes of the liquidation of the bank, substituted for those assets. For these reasons I think that the appeal fails.

SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitors for the appellants: *Bull & Bull.*

Solicitor for the respondents: *Solicitor to the Clearing House.*

J. F. C.

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BRITISH THOMSON-HOUSTON COMPANY, LIMITED *v.* BRITISH INSULATED AND HELSBY CABLES, LIMITED.

[1923. B. 263.]

Evidence—Admissibility—Oral Testimony in former Action against other Defendants—Case lodged on Appeal to House of Lords.

Oral testimony, called in judicial proceedings to prove a certain contention, is not such an admission by conduct of the truth of that contention as to be admissible, in other proceedings, as evidence against the party who tendered the testimony. The fact that the evidence is used and relied upon in the Court of Appeal and printed in the case on appeal to the House of Lords does not make it any more admissible in other proceedings as against the party who tendered it in the Court of first instance.

So *held* by Pollock M.R. and Atkin L.J., Sargant L.J. dissenting.

Decision of Russell J. [1924] 1 Ch. 203 affirmed.

The authorities reviewed.

Appeal from the decision of Russell J. (1)

In 1916 the plaintiffs brought an action against Duram, Ld. (2), for an infringement of their 1906 patent, and one issue of fact was whether the process described in that patent was workable, that is, whether by following the directions of the patent it was possible to obtain a tungsten drawn-wire filament. It was admitted in the present action, which was for infringement of a later patent of the plaintiffs', that the plaintiffs contended in the *Duram* action that by following the directions given in the 1906 patent a filament of tungsten drawn-wire could be obtained. In support of that contention the plaintiffs in the *Duram* action called three expert witnesses who spoke to the truth of it. The action against Duram, Ld., was dismissed on a ground that made it unnecessary to decide that question of fact. The present action was brought by the same plaintiffs against other defendants for infringement of their patent No. 23, 499 of 1909, an invention for "improvements in and relating to the treatment of tungsten to facilitate working."

The defendants pleaded that the 1909 patent was anticipated by that of 1906 disclosing the same process, and the

(1) [1924] 1 Ch. 203. (2) (1916) 34 R. P. C. 117.

same issue of fact therefore became material. In this action, however, the plaintiffs contended that it was impossible by following the directions of the 1906 patent to obtain a tungsten drawn-wire filament, and in support of that contention they called other expert witnesses who contradicted the evidence of those who had given testimony on the point in the *Duram* action. The present defendants claimed to be entitled to use in this action the evidence of the experts in the *Duram* action, on the ground that the putting forward of that evidence was an admission by conduct of its truth. They further contended that they were entitled to read as evidence against the plaintiffs the case lodged by them when the *Duram* case went to the House of Lords. (1)

Russell J. rejected the evidence (2) and the defendants appealed.

Sir Duncan Kerly K.C., *Courtney Terrell*, *R. Stafford Cripps* and *D. H. Corsellis* for the defendants. The defendants are entitled to treat the evidence in question as admissions by the plaintiffs made in the course of judicial proceedings, and therefore as evidence against them in the second action, in which the fact admitted is material although the second action is brought against different parties. In this respect there is no difference between written and oral testimony: per Cockburn C.J. in *Richards* v. *Morgan*. (3)

[POLLOCK M.R. referred to *Brickell* v. *Hulse* (4), where the distinction is clearly drawn, and *Gardner* v. *Moult*. (5)]

It is the conduct of the party that renders the evidence admissible. It must be shown that the party tendering the evidence makes use of it as true with knowledge of its nature. For this purpose there is no distinction between the two kinds of evidence: *Boileau* v. *Rutlin* (6); *Evans* v. *Merthyr Tydfil Urban Council*. (7) Cockburn C.J. in *Richards* v. *Morgan* (3) says that if it can be shown that a witness is called to prove a specific fact, that would be

(1) (1918) 35 R. P. C. 161.
(2) [1924] 1 Ch. 203.
(3) (1863) 4 B. & S. 641, 657; 33 L. J. (Q. B.) 114.
(4) (1837) 7 Ad. & E. 454.
(5) (1839) 10 Ad. & E. 464, 468.
(6) (1848) 2 Ex. 665, 675.
(7) [1899] 1 Ch. 241.

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admissible in future proceedings as an assertion of the fact by the party calling the witness. The reason for the admissibility of the evidence is that the party tendering it and using it makes it his own. This is equally applicable to either kind of evidence. There is no logical distinction between the two. See also *Fleet* v. *Perrins* (1), where Blackburn J. again dealt with *Richards* v. *Morgan* (2) and said that according to that decision a party using in a suit the deposition of a third person makes that deposition evidence against himself for all the world, as the using of it is an admission by conduct that its contents are true.

[They also referred to *Simmons* v. *London Joint Stock Bank* (3) and 13 Halsbury's Laws of England, p. 458, § 636, (*n*) A.]

Sir A. Colefax K.C., *J. Hunter Gray K.C.*, *James Whitehead K.C.* and *W. Trevor Watson* for the plaintiffs. There is no authority for the proposition that a party is entitled to read parts of the oral testimony called by his opponent in other proceedings. In certain circumstances a party who uses a deposition or affidavit may by his conduct make it evidence against himself in other proceedings between himself and a third party, but that does not extend to oral testimony given at the trial of an action: *Brickell* v. *Hulse* (4); *Gardner* v. *Moult.* (5) See also *Boileau* v. *Rutlin* (6) and *Evans* v. *Merthyr Tydfil Urban Council* (7), where a deposition was held inadmissible because it was not proved that the party against whom it was sought to be used had, by using it, made it his own.

Sir Duncan Kerly K.C. in reply.

Cur. adv. vult.

April 7. POLLOCK M.R. The question that the Court has to decide upon this application to read certain evidence is an important one.

(1) (1868) L. R. 3 Q. B. 536; 9 B. & S. 575.
(2) 4 B. & S. 641, 657; 33 L. J. (Q. B.) 114.
(3) (1890) 62 L. T. 427.
(4) 7 Ad. & E. 454.
(5) 10 Ad. & E. 464.
(6) 2 Ex. 675.
(7) [1899] 1 Ch. 241.

The present action is brought to establish the validity and to restrain the infringement of a patent belonging to the plaintiffs, granted in 1909. Earlier proceedings were taken by the same plaintiffs to establish the validity of a patent granted in 1906. That was an action by the present plaintiffs against defendants named Duram Ld. In the course of that action certain witnesses were called by the plaintiffs in support of their case. The evidence of the witnesses so given was taken down, and recorded at the trial, and formed part of the materials in the case on which the decision of the Court of first instance, of the Court of Appeal and of the House of Lords was founded.

In the present action application was made to Russell J. for leave to read the evidence of the witnesses referred to above on the ground (1.) that the plaintiffs procured the evidence and put it forward; (2.) that in presenting and urging their appeal to the House of Lords the plaintiffs used the evidence for the purpose of establishing before that Court that their averments were true. It must be stated here that it is not suggested that every word stated by the witnesses should be admitted as evidence, but only their testimony so far as it recorded questions of fact.

The real ground on which it is contended that this evidence is to be accepted is that the statements of fact made by the witnesses were put forward by the plaintiffs and were adopted by them so as to make the evidence given their own—in other words, that their statements were to be treated as admissions of the plaintiffs themselves.

Russell J. refused permission, and in the course of hearing the appeal on the main questions in the action, the appellants invited us to overrule this decision and to admit the evidence. We have taken time to consider and give our judgment upon the point, for it is one of far-reaching application.

Let me dispose of the second ground on which this application is made at once. Unless the evidence was admissible per se, before the Court of first instance, to my mind no additional ground for admissibility is afforded by the fact that a party in the course of, or for the purpose of

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his appeals, whether to the Court of Appeal or to the House of Lords, made use of or relied upon the evidence given. An appeal is presented upon the materials as a whole which were before the Court of first instance. No appellant can exclude any evidence that was before the first Court; all must go forward to the higher Court. It is not right, therefore, in my judgment to treat evidence that must be presented to it, as stamped in the appellate Court by any fresh mark of adoption which will establish that the evidence is to be treated as admissions made by the appellant, if it were not so at an earlier stage—namely, when the evidence was first given. The evidence is to be treated as—for it has become—part of the proceedings, and it is not to be qualified with any special character in addition. I prefer to express my view on this point as above. It accords with that expressed by Russell J., though he seems to put his reasoning on rather a narrower ground, that the case lodged by the appellant is to be treated as governed by the rule that governs pleas. "Statements of a party in a declaration or plea ought not to be treated as confessions of the truth of the facts stated in them": see per Parke B. in *Boileau* v. *Rutlin*. (1)

I turn, therefore, to the main ground urged for the admissibility of this evidence—namely, that the plaintiffs in their previous case procured it, and put it forward, and made it their own, on the principle that admissions made by a party can be used against him. There is authority for the proposition that affidavits or documents, which a party knowingly uses as true in a judicial proceeding for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact. The cases which were cited to us establish this: for an affidavit see *Brickell* v. *Hulse* (2); for a deposition see *Gardner* v. *Moult* (3); for an affidavit in answer to interrogatories see *Fleet* v. *Perrins*. (4) All these were cases in which the party advancing the documents, whether affidavit or deposition,

(1) 2 Ex. 675, 680, 681.
(2) 7 Ad. & E. 454.
(3) 10 Ad. & E. 464.
(4) L. R. 3 Q. B. 536; 9 B. & S. 575.

knew of its contents beforehand and elected to put it forward in support of his case. Indeed, as Crompton J. said in *Richards* v. *Morgan* (1): "It must always be remembered that it is not the obtaining the affidavit or deposition, but the making use of it as true with knowledge of the contents, which is the ground on which such evidence is supposed to be receivable."

Patteson J. in *Gardner* v. *Moult* (2) expressly adheres to the distinction pointed out in *Brickell* v. *Hulse* (3) as sound; that is that the admissibility depends upon knowledge of the nature of the evidence and an election, upon that knowledge, to advance and rely upon it. See also per Parke B. in *Boileau* v. *Rutlin* (4); and the illustration of this rule afforded by *Evans* v. *Merthyr Tydfil Urban Council* (5). where a deposition was held inadmissible because the proof that it had actually been used and relied upon by the party against whom it was desired to use it, failed.

These decisions do not, however, govern the present application. In *Brickell* v. *Hulse* (3); *Gardner* v. *Moult* (2); and *Boileau* v. *Rutlin* (6) it is stated expressly that a party in a case is not bound by all that his witnesses say at Nisi Prius: see per Lord Denman in *Gardner* v. *Moult* (2), and *Boileau* v. *Rutlin* (6), where Parke B. says: "There could be no reason for holding that his answers would be evidence against the party, any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law, as an implied admission by him, which, it is conceded, *can never be done.*"

But it is said that the decision of the majority in *Richards* v. *Morgan* (7) carries the principle much further and authorizes the admission of the evidence now tendered before us. In that case Blackburn J. was against the admission of the evidence. He goes through the cases now again cited, and gives his explanation of the basis of them, that the party

(1) 4 B. & S. 657; 33 L. J. (Q. B.) 114.
(2) 10 Ad. & E. 464.
(3) 7 Ad. & E. 454.
(4) 2 Ex. 675, 680.
(5) [1899] 1 Ch. 241.
(6) 2 Ex. 675, 680, 681.
(7) 4 B. & S. 641.

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tendering the evidence originally did so for the purpose of proving a certain fact. Crompton J. admits the document in question—a deposition of a witness in a previous Chancery suit, upon this ground: "Upon this state of the authorities I feel bound to hold that a document, knowingly used as true by a party in a Court of justice, is evidence against him as an admission, even for a stranger to the prior proceedings, at all events when it appears to have been used for the very purpose of proving the very fact for the proving of which it is offered in evidence in the subsequent suit." He adds his agreement with the exception of evidence at Nisi Prius (1): "I think also that it now appears that such depositions as those in question do not fall within the class of cases which establish, as a kind of exception, that a party is not bound by evidence which he adduces without knowing what it may turn out to be, as in the common case of the evidence of witnesses, called at Nisi Prius by a party who cannot tell what they will say."

Cockburn C.J. is said to go further. True it is that he says there is no logical distinction to be drawn between oral and written statements, but his qualification must not be neglected or overlooked. He says (2): "While I concur in the position that the evidence of a witness called on a trial is not, necessarily, or to the full extent to which it may go, admissible against the party calling him, in a future proceeding, yet, if it can be shewn that the witness was called to prove a specific fact, it appears to me that this would be admissible as an assertion of such fact by the party calling the witness." Again (3) he says: "It would be in the highest degree unreasonable to suffer the party using the evidence to be affected by that portion which he may have repudiated or disregarded, on the ground that the statements of the witness must be taken to be his."

There is great difficulty in working out such a rule as that stated by the Lord Chief Justice in those passages as to which evidence is to be admissible and what parts of it are

(1) 4 B. & S. 659. (2) 4 B. & S. 662.
(3) 4 B. & S. 663.

to be taken as admissions and what not. *Richards* v. *Morgan* (1) is not binding upon this Court. The observations of Cockburn C.J. were not necessary in their entirety to the particular decision. Inasmuch as he concurs, as he does, and thus agrees with the stream of authority which includes decisions by Lord Denman, Littledale J., Patteson J., Parke B. and Crompton J., I prefer to adhere to the rule as stated by Blackburn J. in *Richards* v. *Morgan* (1), that viva voce evidence called at Nisi Prius cannot be taken as an implied admission of the party calling the evidence. The exceptions and the qualifications which are made by Cockburn C.J. do not, I think, override the plain rule thus stated by those eminent and learned judges.

I venture to adhere to the rule thus laid down, and for those reasons I agree with Russell J. that the application made in the present case must be refused.

ATKIN L.J. In the course of opening this appeal counsel for the appellants has raised the question of the rejection of certain evidence by the trial judge. By common consent the question has been argued by both sides, and we are asked to give a decision upon it on the footing that if the evidence is admissible it is to be read before us as though it had been given at the trial. As it is a matter of considerable legal importance we reserved our decision until to-day. It is necessary to state generally what is the nature of the evidence tendered and rejected at the trial. The plaintiffs are suing on a patent of 1909, the validity of which is in question. Speaking generally one of the defences is that the patent of 1909 was anticipated by a previous patent of the plaintiffs' of 1906, disclosing the same process. One answer of the plaintiffs' is that the patent of 1906 did not in fact disclose the process and that the product claimed under that patent could not in fact have been made by the process specified in that patent. Reply by the defendants : You the plaintiffs put the 1906 patent in suit in an action against the Duram Company, and in that trial you called witnesses to prove that

(1) 4 B. & S. 641.

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they had made the product claimed by the process described in the 1906 patent. The evidence tendered is the transcript of the evidence of certain witnesses called for the plaintiffs at the former trial so far as it tends to prove that the product claimed could be made by the process described, and it is tendered as proof in the present action of that fact, which is a relevant fact. It is tendered as an admission by the plaintiffs of the fact, and it is contended that any evidence used in a trial by a party in proof of any fact is admissible in proof of such fact against that party in any subsequent suit in which he is a litigant. The proposition reaches my mind with complete novelty. In the course of my own experience I have never heard it broached as a rule of evidence or sought to be put in practice, and I must confess that I did not know that it had the authority of Cockburn C.J. to support it, or that there were so many reported dicta against it. One must consider the contention on principle and on authority.

The first matter that appears material is that admissions can only be given in evidence when made by a party, or his agent authorized to make the admission, and that the evidence of a witness is not a statement made by the party, and that the witness is not necessarily, or, indeed, usually, an agent of the party at all either to make an admission or for any other purpose. The witnesses whose evidence is tendered in this case were eminent scientific gentlemen, Mr. Swinburne and Professor Boys, called to give scientific evidence both as to matters of fact and matters of opinion. There is not the slightest evidence tendered that at any time they were in any sense agents of the plaintiffs. But it is said by calling a witness to prove a fact the party declares that the evidence given by such a witness is true, and that such a declaration is an admission by conduct. In any event, it is said, it is such a declaration and admission when the party uses the evidence as proof of the fact. Such a contention appears to me to distort the whole relation of party to witness. In many instances, perhaps in most, witnesses are called to speak to facts of which the party has no

knowledge, often they are called for that very reason. They speak to events when the party was not present and of facts which he would not have understood if he had been present. Often, indeed, the party himself does not know what witness is going to be called, what he is going to say, or what bearing it has upon the suit. Indeed if admission is made at all in calling or using evidence I should have thought it was the admission of the advocate, and there is much authority that admissions by advocates, though authorized for the purpose of the particular suit, are not authorized so as to be binding outside the suit. But assuming that the party is identified for this purpose with his advocate is it true to say that proffering or using evidence is a declaration that it is true? I imagine that the most optimistic litigant would shy at such a burden. He would say: I assert the affirmative or negative of the issue of fact found between me and my opponent. I tender the evidence of persons who are prepared to swear to facts which, if true, I believe will support my case; but as the facts are not within my own knowledge I have no means of judging whether they are true or not. I do not think that morality requires more from a litigant than a belief that the evidence may be true, and the absence of knowledge or belief that it is false. If he is an experienced litigant there will be many cases where his honest belief may be alleged with some honest distrust. But the evidence given may in fact be obviously exaggerated, or intentionally or unintentionally false. It may be contradicted by other evidence also called by the same litigant, or be conclusively overthrown by the evidence of the opponent. To pledge the party to the truth of evidence under these circumstances seems to me to travesty the facts. But it is said the proposition is only that evidence used is admissible, and that does not necessarily include evidence called. We are then left with the question to be determined as a preliminary to the admission of the evidence in the subsequent suit: What is meant by "used"? I was unable during the discussion to obtain any answer that satisfied me, though we were told that if the evidence was put forward

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to the Court it was an admission of the party, even though at the first trial the party, before the conclusion, rejected it. It is obvious that if some user other than the mere eliciting of the evidence in examination is necessary, at the subsequent trial there may have to be an elaborate review of all the circumstances of the former trial, the qualifications on that of subsequent evidence, the speeches of counsel, and a decision whether the evidence of that particular witness was or was not used. In this particular case the only suggestion of user was that the evidence was printed as part of the record in the joint appendix to the cases of plaintiffs and defendants in the House of Lords' appeal. This appears to me to take the case no further than the actual eliciting of the evidence, and to constitute no further use. It is, perhaps, needless to refer to the extra burden that would be thrown upon the advocate who would have to consider the bearing of evidence called by him, not on the issues of the case in which he was concerned, but on the interests of his client in subsequent litigation with other parties with the details of which he might be imperfectly acquainted or not acquainted at all. On principle, therefore, I should come to the conclusion that evidence of third parties used in a trial by a party in proof of any fact is not admissible in proof of such fact against that party in any subsequent suit in which he is a litigant. I should, however, qualify this proposition with two reservations. If the evidence is tendered at the subsequent trial, not in proof of the fact in support of which it was tendered at the first trial, but in proof of the state of mind of the party then using it, on such issues as obtaining the first judgment by fraud, or of malice, or of want of reasonable or probable cause, it may become admissible. Secondly, if the evidence given is that of a witness who at the former trial was in fact the agent of the party, authorized to give the evidence on his behalf, it may then be admissible. If, for instance, on a claim for goods sold and delivered the plaintiff puts his salesman or carman into the witness box to prove delivery, or by a servant or agent seeks to prove to

whom credit was given, or that a bill was dishonoured, and the like, it may well be that such evidence may be treated as an admission by the party or his agent. I express no final opinion about it.

When the authorities are examined, with the single exception of the judgment of Cockburn C.J. in *Richards* v. *Morgan* (1), they are all found to support the view that I have expressed as to the admissibility of parol evidence. A distinction, however, has been drawn as to affidavit evidence, and there are authorities in the Courts of first instance which treat affidavit evidence used by a party as admissible against him in subsequent proceedings. Whether these cases are rightly decided or not need not be determined in this case, for all the cases of this description expressly draw the distinction between affidavit evidence and parol evidence, treating an affidavit read on behalf of a party as a statement directly made by him. The state of the law up to 1837 seems to be accurately stated in the judgment of Blackburn J. in *Richards* v. *Morgan*. (1) Neither parol evidence nor written evidence in Chancery depositions taken before an examiner was admitted. In *Brickell* v. *Hulse* (2), in an action of trover against the sheriff, it appeared that the defendant, who had been instructed to levy several writs of execution against the plaintiff's goods, had applied to a judge in chambers to extend the time for returning the writs in order that he might make an application under the then Interpleader Act, and on that application in chambers had put in an affidavit of one White who said he had seized the goods as officer for the defendant and was in possession of them. This affidavit was tendered at the trial as evidence that White was acting as agent of the defendant. I should have thought that it might well have been held admissible as evidence that the defendant himself, at the hearing of the application, or at any rate by his agent, authorized for that occasion, White, had asserted the existence of White's authority. Lord Denman, however, puts it on the broader ground. He says:

(1) 4 B. & S. 641. (2) 7 Ad. & E. 454, 456, 457.

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"It is very important that this question should not be left subject to doubt. There can, I think, be no question but that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him. There is nothing to distinguish it from a statement made by the party himself. *Rushworth* v. *Countess of Pembroke* (1) at first seems opposed to this view; for there the defendant was not permitted to use any of the depositions made in an equity suit, where the plaintiff had been defendant. That decision, however, was founded on the nature of the proceedings in equity. A party who uses such depositions does not know, beforehand, what they are; if he did, such cases would stand on the same footing as the present. He can only refer to what he expects will be produced; it is like the case of a witness called at Nisi Prius, whose evidence does not bind the party calling him. It is quite different from a case where a party produces, as part of his own statement, an affidavit of which he knows the contents." Coleridge J. says: "This is a very clear case when we attend to the facts. On one side, the defendant makes an application to a judge, and arms himself with a statement, which he makes his own, and uses. That is clearly evidence against him afterwards of the facts in the statement. The statement may be of more or less avail; and it may be matter of remark that the person making the affidavit is present and is not called. But that is not the question here. As to the depositions in equity, they stand on the same footing with viva voce evidence given in a Court of law. A man does not make all that is said by a witness whom he calls evidence against himself hereafter. In Chancery, the depositions are sealed up from the time of their being taken until publication passes. That is like the case of a party calling a witness, whose evidence he does not hear till it is given. The present is the case of a party using a statement which he has seen before he uses it, and which is neither the more nor the less admissible for being made upon oath." Lord Denman appears to have been mistaken as to the practice in equity. But the ground given by him as

(1) (1667) Hard. 472.

the ground for excluding depositions clearly covers, as he says, the case of parol evidence. In *Gardner* v. *Moult* (1) the action was by two assignees in bankruptcy of one Strutton against the public officers of a bank for money had and received. The defendants disputed the act of bankruptcy, on which the plaintiff's title depended. It appeared that the fiat in bankruptcy had been issued on the initiative of the bank, and that the bank had sent one Hay, the manager of a branch of the bank at Chester, to Manchester to prove an act of bankruptcy and that a fiat was opened upon the deposition of Hay that an act of bankruptcy had been committed. This deposition was tendered by the plaintiffs as evidence against the defendants of the act of bankruptcy. Here, again, the case seems to turn on agency, and, indeed, seems to have been expressly decided on that ground. The judgment is as follows: Lord Denman C.J. says: "The examination or deposition of Hay was clearly admissible evidence. The defendants send their servant to prove an act of bankruptcy; and they act on the statement made by him. There is no necessity for entering into the general doctrine. No doubt a party in a cause is not bound by all that his witnesses say at Nisi Prius, or in their depositions in Chancery. But the defendants are here bound by the particular statement which their agent was sent to make." Littledale J. says (2): "The deposition is evidence as much as if it had been made by the defendants themselves. They sent him for the purpose of making it, and they adopted it." Patteson J. says: "The distinction pointed out in *Brickell* v. *Hulse* (3) is a sound one, and I do not intend to depart from it; but it is not material by what name the document is called. It is in substance an affidavit within the meaning of the distinction there laid down, though called a deposition. Hay therein makes a statement of facts, which the petitioning creditors had previously ascertained from him that he was able to make. He says nothing but what they knew he would say, and was subject to no cross-examination.

(1) 10 Ad. & E. 464. (2) 10 Ad. & E. 468.
(3) 7 Ad. & E. 454.

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Chambers v. *Bernasconi* (1) is not in point. The depositions were there offered against the assignees, and not, as here, against the petitioning creditor." Williams J. says: "The solicitor of the defendants is employed by them to obtain evidence of a certain fact in order to support a fiat. For that purpose he produces the deponent, who swears to the specific fact which he was expressly called to prove. Under such circumstances, the affidavit is like one made by the principal, and admissible by the same rule. The question, too, is not what it proves, but whether, upon this record, it was admissible at all." In *Cole* v. *Hadley* (2), an action for trespass, the question was raised as to the right of the defendant to put in the deposition of a witness on an information laid against the defendant by the plaintiff at the Berkeley petty sessions for malicious trespass. The evidence had been admitted and the case is reported upon a motion for a rule for a new trial on the ground of misreception of evidence; a rule was refused. The case is shortly reported and the facts are not clear. The deposition is said to have been that of the vicar of the parish, who had been called at petty sessions by the plaintiff to prove that the plaintiff was his tenant and had in fact denied that the plaintiff was his tenant. What the precise procedure was, whether for an indictable offence, as the word "deposition" would suggest, or for some offence within the summary jurisdiction of the justices, one does not know, and if the latter it is not clear how the "deposition" came into existence. The vicar had since the hearing at petty sessions gone abroad. The Court referred to *Gardner* v. *Moult* (3) and *Brickell* v. *Hulse* (4), but in what connection it is not easy to see. They cannot have been qualifying their express reservation in *Brickell* v. *Hulse* (4) of parol evidence. The case seems to me of little authority. The explanation may be that the deposition was that of a witness who had since gone beyond seas, and was treated as admissible on that ground.

(1) (1834) 1 C. M. & R. 347; S. C. 4 Tyrwh. 531.
(2) (1840) 11 Ad. & E. 807.
(3) 10 Ad. & E. 464.
(4) 7 Ad. & E. 454.

I should not refer to the next case, *Slatterie* v. *Pooley* (1), if it were not treated as an authority in the Court of Common Pleas in *Pritchard* v. *Bagshawe* (2) for what appears to be a different proposition. In *Slatterie* v. *Pooley* (1) the plaintiff in action on covenant claimed that the defendant had covenanted to indemnify him against the claims of creditors whose debts were entered in the schedule to a certain deed of composition, but who did not execute the deed. The issue was whether the debt of one Thomson was scheduled to the deed. At the trial the deed was rejected, not being duly stamped, but the judge admitted a verbal admission by the defendant that the debt mentioned in the declaration was the same with one contained in the schedule. The decision of the Court was that the admission by a party as to the contents of a written document is admissible without production of the written document.

In *Pritchard* v. *Bagshawe* (2) the action was trover, the plaintiffs alleging a conversion by the defendants of plant belonging to their testator. The question was whether dealing with the plant by two persons Robertson and Dimsdale bound the defendants. It appeared that the defendants had instituted a suit against a third party for specific performance of a contract relating to the subject matter of the action, and in the taking of an account ordered in that suit the defendants before the Master had used an abstract of title containing particulars of a deed whereby Robertson and Dimsdale had assigned the property to the defendants; and in the suit had used an affidavit by Dimsdale stating in effect that he was manager of the defendants. The plaintiffs tendered in evidence the affidavit and the deed. Mr. Phipson for the defendants admitted in argument that the affidavit having been used by the defendants in the Chancery suit was no doubt admissible evidence against them; but he contested the admissibility of the abstract as being merely a recital or extracts from deeds. No question therefore was decided by the Court as to the affidavit, and they held that the principle of *Slatterie* v. *Pooley* (1) made the abstract

(1) (1840) 6 M. & W. 664. (2) (1851) 11 C. B. 459.

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admissible. The Court seems to have regarded the abstract as a document produced before the Master by the defendants themselves as the deed of themselves or their predecessors in title, and therefore to have been a direct admission. Except for the admission of counsel this case seems to have little bearing on the point at issue.

In *Boileau* v. *Rutlin* (1) in an action for use and occupation the defendant relied upon an agreement to purchase under which he had been let into possession, and in order to prove the agreement tendered a bill in equity in a suit by the plaintiff for specific performance of the same agreement in which the agreement was set out verbatim. Lord Denman at the Surrey Assizes had admitted the evidence, but it was held by the Court of Exchequer, Parke, Alderson, Rolfe and Platt BB., that it was inadmissible. In the course of the argument this passage occurs (2): "In *Brickell* v. *Hulse* (3) the party had used the affidavit as a true statement, and therefore it was admitted as evidence against him. The Court there advert to the distinction between affidavits so used and depositions made in a suit in equity. Parke B.: The marginal note to that case is not quite correct. If a person uses an affidavit containing a hundred different statements, they cannot all be evidence against him. Alderson B.: The decision itself is quite correct; and the marginal note should have been, 'Where a sheriff, in a case of interpleader before a judge, puts in an affidavit of his officer, that the latter seized the goods, that is evidence as against a sheriff, that the officer did so seize.'" Then Parke B. says (4): "In this state of the authorities directly bearing upon this question, there can be no doubt that the weight of them is against the reception of a bill in equity as an admission of the truth of any of the alleged facts. But it was argued, that there are many more recent authorities indirectly bearing upon this question, which afford a strong analogy in favour of the reception of a bill in equity as evidence in the nature of a confession. These are the cases of *Brickell* v. *Hulse* (3)

(1) 2 Ex. 665.
(2) 2 Ex. 675.
(3) 7 Ad. & E. 454.
(4) 2 Ex. 679, 680.

and *Gardner* v. *Moult*. (1) In the first of these, a party using an affidavit on a motion, in the second, by sending another to state a particular fact, was held to make the affidavit and statement respectively evidence against himself. These cases do not fall under the description of pleadings by parties; they are rather instances of admission by conduct, and are analogous to those in which the declarations of third persons are made evidence by the express reference of the party to them as being true. This is the explanation very rightly given in Mr. Taylor's recent Treatise on Evidence. In the first of the above-mentioned cases it may be presumed that the defendant prepared the affidavit, which he afterwards exhibited as true; at all events, that he exhibited it *for the purpose of proving a certain fact*. In the second, it must be taken that he sent the servant to prove *a particular act of bankruptcy*; for, if he sent him to be examined as a witness, and to give evidence generally as to any act to which the commissioner might examine him, there could be no reason for holding that his answers would be evidence against the party, any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law, as an implied admission by him, which, it is conceded, can never be done: see Lord Denman's judgment in both the cases last cited. The case of *Cole* v. *Hadley* (2) was also referred to as an authority. From the short report of that case, it is not clear on what ground the evidence was received. It would seem that it was received as the deposition of a witness on a prior inquiry, between the same parties, on the same question. It could not be on the ground that the statement was evidence against the party, simply because the witness was produced by him, as the contrary was laid down in the two cases of *Brickell* v. *Hulse* (3) and *Gardner* v. *Moult* (1) which were referred to. These authorities, therefore, afford no reason for doubting the propriety of the decisions above referred to as to bills in equity. It would seem that those, as well as pleadings at

(1) 10 Ad. & E. 464. (2) 11 Ad. & E. 807.
(3) 7 Ad. & E. 454.

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common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied to be proved, and ultimately submitted for judicial decision." In *Richards* v. *Morgan* (1) in an action of replevin for taking sheep the defendant averred that he took the sheep for damage feasant on ground which he held as tenant of one Meyrick who was the owner in fee. The issue was whether Meyrick was owner of the locus in quo, or whether it was part of the property of the Marquis of Bute, the lord of the manor in which the locus in quo lay. It appeared that in 1842 one Edwards had brought a suit in equity against Meyrick to set aside the purchase from Edwards of the property in question on the ground that Meyrick had been his solicitor and had bought the property at an undervalue. In order to show the true value two depositions of former tenants of the farm, Morgan and Harris, had been taken to show the boundaries of the farm with a view of showing that it was of little value, which tended to exclude the property in question from the subject of the purchase. Those depositions had been read and used as evidence in the suit by Meyrick's counsel. In the replevin trial those two depositions were tendered as evidence against the defendant, who was Meyrick defending in the name of his tenant, and were admitted at Glamorganshire Assizes by Wilde B. On argument of a rule for a new trial it was held by a majority of the Court of King's Bench that they were admissible, Blackburn J. dissenting. Crompton J. held that they were admissible as documents knowingly used by the party as true in the previous proceedings; Cockburn C.J. held that they were admissible on the ground that where a witness is called for the purpose of proving a particular fact this amounts to an assertion of that fact by the party who so uses his testimony; Blackburn J. dissented on the ground that using the evidence of a witness, whether that evidence be viva voce or reduced into writing, does not constitute an admission by the party so as to make it admissible as

(1) 4 B. & S. 641.

evidence against him. I do not propose to discuss the judgments at length, for it seems to me plain that the majority judgment must depend upon the reasons given by Crompton J., who confined his reasoning to the use of the depositions as documents the truth of which was asserted by the party, and plainly recognized the distinction of evidence called at Nisi Prius. He said: (1) "Upon this state of the authorities I feel bound to hold that a document, knowingly used as true by a party in a Court of justice, is evidence against him as an admission, even for a stranger to the prior proceedings, at all events when it appears to have been used for the very purpose of proving the very fact for the proving of which it is offered in evidence in the subsequent suit. I think also that it now appears that such depositions as those in question do not fall within the class of cases which establish, as a kind of exception, that a party is not bound by evidence which he adduces without knowing what it may turn out to be, as in the common case of the evidence of witnesses called at Nisi Prius by a party who cannot tell what they will say." The judgment of Cockburn C.J. appears to me with respect to be contrary to every case decided up to that date so far as parol evidence is concerned. It is no doubt limited to the admissibility of evidence only so far as it shall appear to have been used to establish a given fact or facts. I have already pointed out that all evidence is adduced to establish a given fact or facts; and what difficulties arise from the necessity of considering the use of it. No doubt the learned Chief Justice appreciates the logical difficulty of distinguishing between the admissibility of evidence given on the one hand in writing or on the other viva voce. The same difficulty would lead me as at present advised to concur with the reasoning of Blackburn J. if I had to decide the question of affidavit evidence. But the case is only an authority for the admissibility of affidavit evidence. It is not binding upon us and I am not prepared in any case to follow it further than it goes. *Fleet* v. *Perrins* (2) is a case of interrogatories administered to the party

(1) 4 B. & S. 659. (2) L. R. 3 Q. B. 536.

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and of answers admissible as direct admissions of acts by the party. It has no bearing upon this case, and except for a reference by Blackburn J. to *Richards* v. *Morgan* (1) immaterial to his decision would appear to be irrelevant. Finally in *Evans* v. *Merthyr Tydfil Urban Council* (2) the question arose between the plaintiffs and the defendants whether a certain piece of land was common land. It appears that in 1815 a cause was depending in the High Court of Chancery of the Great Sessions of Wales between one Clifton and T. H. Gwynne who was alleged but not admitted to be the predecessor in title of the defendants. What the nature of that suit was does not appear from the report. In the suit a deposition of one Williams had been taken apparently on behalf of Gwynne, though that is not stated in the report. There was no evidence however that it had ever been used, and the Court of Appeal held that it was inadmissible. Counsel for the defendants do not seem to have disputed the decision in *Richards* v. *Morgan* (1); and the decisions in the Court of Appeal do not seem to amount to more than assuming *Richards* v. *Morgan* (1) to be correct the case did not fall within it.

I have now reviewed the whole of the authorities on this subject. They show the law as to the admissibility of affidavit evidence to be in an uncertain and unsatisfactory condition. Up to 1837 such evidence was rejected; in that year there begins in the King's Bench a line of authority based upon a misapprehension of Chancery procedure by the Court, and a mistaken explanation of the former authorities based upon that misapprehension. The authorities however are confined to the admissibility of written evidence, treating such evidence as documents the truth of which is declared by the party using them. They in terms reject parol evidence as coming within the rule they lay down. In my opinion to admit parol evidence of witnesses given in the circumstances of the present case would be contrary to established principles of evidence, and would reverse the full current of authority. I desire to say nothing as to the facts

(1) 4 B. & S. 657. (2) [1899] 1 Ch. 250.

of the present case. But that a party should assert in one action what he has denied in another, and should call witnesses in one action in support of a fact which he called witnesses to deny in another, is not uncommon. It can be done with perfect honesty. In the case of a chain of contracts for the purchase of goods where the question of quality is raised, it is quite usual for an intermediate purchaser to be compelled to face both ways, putting forward information supplied to him from either end of the chain; and at times he has to support the different views in two actions, relying in the first action on the evidence of witnesses produced by the sellers, and in the second on witnesses produced by the buyer or vice versa. If the one case is disproved I see no reason at all why he should be assumed by calling the evidence to have admitted its truth. In my opinion there is no reason in public policy why the rule as stated above should not be followed. I think that the evidence tendered should not be admitted.

SARGANT L.J. At this point we have to decide a question as to the admissibility of certain evidence which the appellants sought to tender in the following circumstances. In the previous action against the Duram Company the plaintiffs, the British Thomson-Houston Company, had to establish the sufficiency of the 1906 specification in the sense that the process there described was a workable one. To do so they brought forward evidence of three expert witnesses of the highest qualifications—namely, Mr. James Swinburne, Professor Boys and the late Dr. Passmore, to the effect that these witnesses had effectively worked the process described in the 1906 specification so as to produce drawn-wire filaments of tungsten; one of such filaments, as I understand, being produced in Court and being in fact ductile cold. The sufficiency of or workability of the 1906 specification is now denied in the present action by the same plaintiffs, and the defendants claim that the evidence of the three experts so put forward and used by the plaintiffs is admissible against them as some evidence of the fact for which they previously used it.

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Both the decisions and the reasoning of the various judges who have previously dealt with a similar question are at first sight conflicting, and are perhaps not completely reconcilable on any view. In *Brickell* v. *Hulse* (1) affidavit evidence put forward in a motion was held to be admissible on a subsequent trial against the party using it; but in so holding, Lord Denman C.J. drew a distinction between evidence the contents of which were known to the party before he used it, and depositions in Chancery or evidence at Nisi Prius the whole effect of which was not within the knowledge of the party. And Coleridge J. pointed out that in the case of viva voce evidence "a man does not make all that is said by a witness whom he calls evidence against himself hereafter"; and he put the case of general depositions in Chancery under the old practice on the same footing; because he and the Chief Justice thought—though wrongly—that the party using them did not previously know their contents, and therefore it was "like a case of a party calling a witness whose evidence he does not hear till it is given."

In *Gardner* v. *Moult* (2) the question was as to the admissibility against a defendant of a deposition put in at his instance to prove an act of bankruptcy. Lord Denman C.J. and Patteson J. were again members of the Court and admitted the evidence. Lord Denman said: "The examination or deposition of Hay was clearly admissible evidence. The defendants send their servant to prove an act of bankruptcy; and they act on the statement made by him. There is no necessity for entering into the general doctrine. No doubt a party in a cause is not bound by all that his witnesses say at Nisi Prius or in their depositions in Chancery. But the defendants are here bound by the particular statement which their agent was sent to make." And Patteson J. reaffirmed the soundness of the distinction taken in *Brickell* v. *Hulse*. (1)

Then came what is undoubtedly the most important case on the subject—namely, *Richards* v. *Morgan* (3), which was decided by a Court composed of Cockburn C.J., Crompton

(1) 7 Ad. & E. 454. (2) 10 Ad. & E. 464, 468.
(3) 4 B. & S. 641, 657.

and Blackburn JJ. In this case depositions had been put forward and used by a defendant (a solicitor) in a suit in Chancery for the purpose of minimizing the extent or acreage of a property which he had purchased from a client. And in subsequent proceedings by a different plaintiff against the same defendant it was held (Blackburn J. dissenting) that this evidence was admissible in favour of the then plaintiff.

The reasoning of the three judges was very different. The Chief Justice and Blackburn J. both thought that oral evidence and written evidence, at any rate so far as used to establish a specific fact such as the extent of the property then in question, stood upon the same footing as regards admissibility against the party using it; but the Chief Justice thought that both were admissible, and Blackburn J. that both were inadmissible.

The Chief Justice, in a passage which has been cited by the learned judge in this case, said (1): "Bearing in mind that the true ground on which such evidence is admissible is, that a party seeking to establish a fact by evidence in a Court of justice, must be taken to assert the fact he so seeks to prove, it seems to me to follow; on the one hand, that oral evidence, so far as it shall appear to have been used to establish a specific fact, will be evidence against the party using it, as an assertion of that fact; and, on the other, that written evidence will be admissible against the party using it in a subsequent proceeding with a different party, not for the purpose of proving all the statements it may contain, but only so far as it shall appear to have been used to establish a given fact or facts."

Blackburn J., in refusing to admit the evidence, pointed out inconveniences and difficulties that might arise from the admission of such evidence. On the other hand Crompton J. thought that written evidence such as that then in question was admissible and that what made such evidence admissible was "*the making use of it as true with knowledge of the contents*"; but he recognized "as a kind of exception, that

(1) 4 B. & S. 663.

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a party is not bound by evidence that he adduces without knowing what it may turn out to be, as in the common case of witnesses called at Nisi Prius by a party who cannot tell what they will say."

The cases in which a party in an earlier action brings evidence to prove a particular fact, and then in a subsequent action brings evidence to prove the contrary, can hardly be numerous. There is no record in the subsequent cases of any such inconveniences having arisen as Blackburn J. feared at any rate with regard to previous written evidence. Nor do I think that such inconveniences are likely to occur as regards either class of evidence, if the admissibility is confined to evidence definitely brought forward to prove a particular fact or facts, and does not extend to the whole of the evidence of a witness whether expected or intended or not. And there are two subsequent cases—namely, *Fleet* v. *Perrins* (1) and *Evans* v. *Merthyr Tydfil Urban Council* (2), the second a case which went to the Court of Appeal, in which the question was the admission of written evidence, and in which the decision in *Richards* v. *Morgan* (3) was approved. And therefore if, as the majority of the Court in *Richards* v. *Morgan* (3) thought, and as it seems to me rightly thought, the admissibility of written evidence and verbal evidence must be accepted or rejected on the same principles, the weight of authority is in my judgment decidedly in favour of the admission of both classes of evidence, so far, at any rate, as it has been brought forward by a party for the purpose of proving specific facts.

But if, as the learned judge has thought, the matter is still at large, which is the preferable view on general principle? In my opinion it is that evidence of specific facts, which has once been definitely adopted and placed before the Court as true by a party to previous proceedings, is admissible against him thereafter, as constituting an assertion or statement by him to that effect of those specific facts. An assertion of such facts by the oath of a witness tendered for the purpose is a particularly definite and deliberate assertion by the party of

(1) L. R. 3 Q. B. 536. (2) [1899] 1 Ch. 241.
(3) 4 B. & S. 657.

the specific facts in question. And I can see no reason nor logic in a system of evidence which, while treating as admissible against a party a statement made less solemnly and deliberately by himself, should exclude and ignore a far more solemn and deliberate assertion which he has caused to be made through the sworn testimony of others. The present case seems to me a strong illustration of the unreasonableness of such a system. In the action against Duram, as I have already said, the plaintiffs placed before the Court the evidence of three distinguished experts to prove the definite specific fact that they had by working under the process disclosed by that specification produced drawn tungsten filaments, a specimen of the result of such working being actually produced. To-day, however, the plaintiffs having failed to support their 1906 patent for a totally different reason, find it to their interest to deny the sufficiency of the 1906 patent, and to maintain that it is impossible by following the 1906 specification to produce drawn tungsten filaments. And they claim when doing so to start entirely afresh, and to be entitled to ignore altogether the deliberate assertion which they caused to be made on oath of specific facts altogether incompatible with their present case.

This claim is to my mind a rather shocking one, and such as ought not to be recognized by the Court. It is not as if the defendants were relying here on an estoppel, or were seeking to prevent the plaintiffs altogether from asserting the insufficiency of the 1906 specification in the above-mentioned sense. It is admitted that the plaintiffs are at full liberty to show that they never knew that their experts were about to give evidence of these specific facts, or on the other hand may bring forward evidence by two of the three experts in question or by any one else to negative, explain or qualify the evidence already given, and to show that notwithstanding that evidence the real facts are that the 1906 process cannot be successfully worked. All that the defendants say is that the evidence of specific facts already put forward by the plaintiffs is admissible for what it is worth as a statement by the plaintiffs; and that the plaintiffs are not at liberty to

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completely ignore the evidence and proceed as if it had never been given or put forward by them.

The plaintiffs' position here seems to me the more indefensible because in proceedings such as those in the previous action, and again in the present action, which are instituted by wealthy monopolists and are fought at lavish cost, a monopoly is substantially though not technically sought to be enforced not merely against the actual defendants but also against the public. And on the plaintiffs' view it is permissible, in support of such monopolies, to put forward a set of specific facts deposed to by a number of experts, and then at a subsequent period to entirely ignore these facts, and to put forward a contrary set of facts supported by another set of experts as if no evidence at all had ever been given in favour of the original set of facts. In this particular case the plaintiffs appear to have originally consulted the three specialists already referred to and at least one other—namely, a Dr. Oberlander. Dr. Oberlander seems to have formed a view as to the possibility of working the 1906 specification contrary to the views of the other three; and naturally therefore he was not called by the plaintiffs in the former proceedings, and of this no complaint can be made. But the matter is very different when in the present proceedings the plaintiffs, while calling the evidence of Dr. Oberlander and a fifth expert, Professor Gray, in direct contradiction to the view previously presented by the plaintiffs, claim further that direct evidence of specific facts put forward by them through the first three experts on the previous occasion is entirely inadmissible now and must be completely ignored. This contention seems to me anomalous, and calculated to give an illegitimate advantage to wealthy monopolists against rival manufacturers, and through them, against the general public. And in my view dangers of this kind are greater than those to be apprehended from holding litigants liable to have admitted against them evidence which they have previously adopted and put forward to prove specific facts.

I have dealt with the question here throughout on the

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basis of an admissibility arising from the original adoption and putting forward by the plaintiffs of the evidence in question at the original hearing of the action against the Duram Company. I do not think that the case in this respect against the plaintiffs is altered or strengthened by the printing of the evidence, by its use in the Court of Appeal, or by its inclusion in the appendix to the case in the House of Lords. All this merely amounts to a reiteration which was necessitated in the course of appeals which the plaintiffs were fully entitled to bring. Such a reiteration has not, in my judgment, any greater effect than the original assertion of the specific facts in question.

In my judgment the evidence in question was admissible, as contended for by the appellants.

Appeal dismissed.

Solicitors: *Bristows, Cooke & Carpmael; H. C. Morris, Woolsey, Morris & Kennedy.*

G. A. S.

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In re TRADERS AND GENERAL INSURANCE ASSOCIATION, LIMITED.

Ex parte CONTINENTAL AND OVERSEAS TRADING COMPANY, LIMITED.

[00350 of 1922.]

Marine Insurance Policy—"Warehouse to warehouse clause"—Construction—Commencement of Risk—Liquidation of Insurance Association—Damage to Goods by Fire—Rejection of Proof in Liquidation.

By a marine insurance policy the applicants insured with the Traders and General Insurance Association, Ld., one-half of certain goods from Antwerp to Karachi and the other half from Antwerp to Calcutta "beginning from the loading thereof aboard ship." The policy incorporated a "warehouse to warehouse" clause to the effect that the insured goods were covered "from the time of leaving the shippers' or manufacturers' warehouse during the ordinary course of transit until on board the vessel." The goods in question were purchased from a firm at Termonde, in Belgium, and were forwarded from thence on October 7, 1920,

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to Antwerp by canal barge for shipment on a steamer to India due to sail on October 12, 1920. They were received by the agents of the buyers on October 8 and warehoused to await shipment. On October 11 a fire occurred at the warehouse and damage to the alleged amount of 621*l.* was suffered. The insurance association went into liquidation and the liquidator rejected the applicants' proof for the damage on the ground that the goods had not at the time of damage left the shippers' or manufacturers' warehouse. On appeal from that decision :—

Held, that as the terminus a quo mentioned in the specification (which formed part of the policy) was the port of shipment and the transit "by steamer" the clause referred to could not be construed as imposing liability from the commencement of the transit from the factory at Termonde, nor could the discharge from a barge be held equivalent to the time of leaving the warehouse referred to in the clause.

Held, therefore, that the decision of the liquidator was right.

THIS was an appeal by the Continental and Overseas Trading Co., Ld., from the decision of the liquidator of the Traders and General Insurance Association, Ld., who had rejected the applicants' proof for 621*l.* 14*s.* 4*d.* This claim was in respect of damage to the applicants' goods caused by a fire at a warehouse in Antwerp. The facts were not in dispute and are taken in substance from the judgment of the Court.

In March and April, 1920, the claimants purchased goods —10 bales of 150 blankets each—from the Société Anonyme La Dendre of Termonde in Belgium, and the sellers, on the instructions of the buyers or their agents, forwarded the bales from Termonde to Antwerp by barge on October 7, 1920, for shipment on the steamship *Trevethoe*, due to sail from Antwerp for India on the 12th of the month. When the goods arrived at Antwerp on the 8th they were removed from the barge by the agents of the buyers and warehoused to await shipment. The fire which damaged them broke out in the warehouse on October 11.

The policy covered the peril of fire and insured one-half of the goods from Antwerp to Karachi and the other half from Antwerp to Calcutta "beginning from the loading thereof aboard ship," but it incorporated the "warehouse to warehouse" clause, No. 6 of the Institute Cargo Clauses, which was in these terms: "The insured goods are covered subject to the terms of this policy from the time of leaving the

shippers' or manufacturers' warehouse during the ordinary course of transit until on board the vessel, during transhipment, if any, and from the vessel whilst on quays, wharves or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named in policy." The question at issue turned upon the true construction of this clause.

C. T. Le Quesne for the applicants. This cl. 6 of the marine policy extends the liability of the insurance company to risks incurred before actual shipment. The risk described on the document commences "from the time of leaving the shippers' or manufacturers' warehouse." On the plain words, therefore, the risk began when the goods left the manufacturers' warehouse at Termonde, and the intention was to cover the assured from the moment when the goods left the sellers' warehouse. Alternatively, if that is not the true construction, then the risk would commence when the goods were discharged at the warehouse at Antwerp where the fire occurred.

W. N. Raeburn K.C. and *J. Willoughby Jardine* for the liquidator. There is no authority on this point, which must be decided on fundamental principles. But for the "warehouse to warehouse" clause this risk would not attach until the goods were on the ship. The termini of the voyage here are the governing factors, Antwerp to Karachi and Calcutta. The insurance association could not have intended to cover a long land transit which was not specifically mentioned in the specification; it must be limited to the ambit of the terminus a quo. There are cases as to the determination of the risk at the terminus ad quem, such as *Marten* v. *Nippon Sea and Land Insurance Co.* (1), but none on this point here raised as to the terminus a quo. Here the voyage began at Antwerp; that is the governing construction. The applicants could have insured for the risk of transit from a distant inland place if it had been so stated in the specification, but here it is not mentioned to be from Termonde via Antwerp to

(1) (1898) 3 Com. Cas. 164, 168.

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Calcutta. In the policy the word " shippers " comes first, and Antwerp is the terminus a quo and not Termonde. Secondly, as to the alternative claim that the delivery from a barge was the same as that from a warehouse, there is authority against that. A barge or lighter is not a warehouse: *Fisher, Reeves & Co.* v. *Armour & Co.* (1), although " ex store " might be held synonymous with " ex warehouse." In the present case, which is of great general importance to shippers, the liquidator was justified in rejecting the proof of damage.

Le Quesne in reply. There was here no undetermined risk; the " manufacturers' warehouse " was stated. But assuming that the transit began at Antwerp, the goods were on transit there from barge to steamer.

Cur. adv. vult.

April 9. EVE J. This is an application to review the decision of the liquidator of the Traders and General Insurance Association, Ld., rejecting a proof of 621*l.* odd made in the liquidation by the Continental and Overseas Trading Co., Ld.

The claim is advanced in respect of damage done by fire to goods alleged to be covered by a policy of marine insurance issued by the liquidating association. The contention on behalf of the liquidator is that the risk was not covered by the policy in that the goods had not at the time of damage left the shippers' or manufacturers' warehouse during the ordinary course of transit within the meaning of the policy. The facts are not in dispute. [His Lordship stated the facts and read cl. 6.] On behalf of the claimants it is argued that according to the true construction of the policy the risk began when the goods left the manufacturers at Termonde, or alternatively when they were discharged at Antwerp, to which it is answered (1.) that the underwriters cannot be held to have intended to undertake a risk which might have involved an undisclosed and lengthy land transit and one which is specifically mentioned in the specification attached to the policy in those cases in which it is to be

(1) [1920] 3 K. B. 614, 624.

included, and (2.) that the discharge or delivery at Antwerp was not a delivery from a warehouse at all but from the barge—a condition of things to which the clause has no application.

In order to arrive at the true construction of the clause it is, of course, necessary to have regard to the whole of the documents, including the specification incorporated as part of the policy. The clause undoubtedly extends the liability of the insurers to risks incurred prior to shipment, but the nature and area of that extension must, in my opinion, be ascertained in each case by reference to the terms of the specification relating to the particular goods. Where goods are specified as consigned from Paris, Lyons, and other centres necessarily involving land transit, the additional risks of that transit would, in my opinion, be covered, but where—as is the case with the two parcels out of which this claim arises—the terminus a quo mentioned in the specification is the port of shipment, and the transit is in terms "by steamer," I cannot accept the view that the clause ought to be construed as imposing liability from the commencement of the transit from the factory or, indeed, at any point outside an area which, having regard to the local conditions, might fairly be held to be within what Mr. Raeburn has aptly spoken of as the ambit of the terminus a quo. Nor, in my opinion, ought I to treat the discharge ex barge on October 8 as equivalent to the leaving of the warehouse referred to in the clause.

The result is that, in my opinion, the decision of the liquidator was right, and this summons must be dismissed with costs.

Solicitors: *Simmons & Simmons*; *Clifford Turner & Hopton.*

G. M.

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March 20, 21; *April* 15.

In re PENTON'S SETTLEMENT TRUSTS.

PENTON *v.* LANGLEY.

[1923. P. 3324.]

Settlement of Realty—Chattels settled as Heirlooms—"To devolve and be enjoyed with the settled hereditaments"—Joint general Power of Appointment over settled Realty to Settlor and eldest Son—Exercise as to Heirlooms alone—Validity—Implied corresponding Power.

By a settlement made by a father and his eldest son certain freehold hereditaments were appointed and conveyed to such uses and trusts and subject to such powers as the father and son should by deed appoint, and in default, and until, and subject to any such appointment, to the use of trustees for a term of 1000 years upon trust to raise certain annual sums and subject thereto to the use of the father for life, and after his death for his eldest son for life, with remainder to his first and other sons successively in tail male, with remainder to the use of the second son of the settlor for life, and then to his first and other sons successively in tail male; with remainders over. By the same indenture certain jewels were assigned to the trustees upon trust that they should allow the same to devolve and be enjoyed, so far as the law would permit, as heirlooms along with the settled hereditaments. By a subsequent indenture made in purported exercise of the power conferred on them the father and eldest son appointed that the trustees of the settlement should stand possessed of the jewels in trust for the father absolutely.

Upon a summons by the father and son asking for a declaration that under the trust in the settlement they had a joint general power of appointment over the jewels corresponding to but exercisable independently of their joint general power of appointment by deed of the settled hereditaments:—

Held, that the Court was bound to import into the trusts of the chattels a general power of appointment corresponding with the first limitation of the realty as the only means of securing unity of ownership in the event of the realty being withdrawn from the settlement, and the settlors desiring to maintain unity of ownership.

Held, further, that such a trust, if included in the trusts affecting the personalty, could not be restricted in its application to occasions when the realty was being dealt with under the corresponding limitation, and the applicants were entitled to the declaration asked.

By an indenture of settlement dated February 13, 1907, made between the plaintiff, Frederick Thomas Penton, of the first part, the plaintiff Henry Alexander Penton, his eldest son, of the second part, and four trustees of the third part, certain freehold hereditaments therein mentioned and

now known as the Penton Estate, Clerkenwell, in the county of London, were appointed and conveyed (subject as therein mentioned) to such uses, upon such trusts, and with and subject to such powers, provisoes, agreements, and declarations, as the plaintiff F. T. Penton should, jointly with the plaintiff H. A. Penton, or with other the person entitled under the limitations of the said indenture to the first estate of freehold in remainder, immediately expectant on the death of F. T. Penton, in the hereditaments thereby settled, from time to time, or at any time by deed, revocable or irrevocable, appoint, but so that no such appointment should override or affect the rentcharge and annual sums thereinafter limited to and made raiseable for the widow and children of H. A. Penton in case he should predecease F. T. Penton, nor any jointure rentcharge or sum for portions charged by H. A. Penton under the powers in that behalf thereinafter contained, and in default of, and until and subject to any such appointment to the use of the parties of the third part for the term of 1000 years from the date of the said settlement upon trusts for raising out of the rents and profits of the said hereditaments the annual sums therein mentioned, and, subject to the said term and to the trusts thereof, to uses for securing certain rentcharges and annual sums for H. A. Penton and his widow and children respectively, and subject to the said rentcharges and annual sums to the use of F. T. Penton for his life, and after his death to the use of H. A. Penton for his life, with remainder to the use of the first and other sons of H. A. Penton, successively according to seniority in tail male, with remainder to the use of the defendant Cyril Frederick Penton (the second son of F. T. Penton) for his life, with remainder to the use of the first and other sons of C. F. Penton successively according to seniority in tail male, with divers remainders over. And by the said indenture the jewels specified in the third schedule thereto were assigned to the said parties of the third part upon trust that they, or other the trustees for the time being of the said indenture, should allow the said jewels to devolve and be enjoyed, so far as the law would permit, as heirlooms

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along with the said hereditaments thereby settled, but so nevertheless that the said jewels should not vest absolutely in any person thereby made tenant in tail male, or in tail general by purchase, unless and until such person should attain the age of twenty-one years and either become entitled before the expiration of twenty-one years from the determination of all estates for life preceding his or her estate in tail male or in tail general, to the actual possession, or to the receipt of the rents and profits of the settled hereditaments, or should with the consent of the protector of the settlement bar the entail therein, but on the death of any such person before attaining an absolutely vested interest in the said jewels the same should devolve in like manner as if they had been freeholds of inheritance, and had been settled by the said indenture accordingly. And it was by the said indenture provided by cl. 45 that it should be lawful for each and every male person for the time being entitled under the trusts aforesaid to the use and possession of the said jewels, by deed, revocable or irrevocable, or by will or codicil, to appoint that any wife of his who might survive him should be entitled, so long as she should be his widow, or during any shorter period, to the use and enjoyment of the said jewels.

One of the original trustees of the settlement died on August 28, 1920, and by an indenture of May 28, 1921, the plaintiff, F. T. Penton, in accordance with a power contained in the settlement, appointed his second son, the defendant Cyril Frederick Penton, to be a trustee of the settlement in place of the deceased trustee. The first four defendants were the present trustees of the settlement. The plaintiff F. T. Penton had two sons only—namely, the plaintiff H. A. Penton and the defendant C. F. Penton. H. A. Penton had one son only, who was born in 1917 and died in 1918. C. F. Penton had one son only, the last defendant, John Maurice Penton, an infant born in 1910. No appointment by deed had ever been made under the power in the settlement of appointing an interest in the jewels to a surviving wife.

By an indenture dated October 31, 1923, made between

the two plaintiffs of the first and second part respectively and the trustees of the settlement of the third part, the plaintiffs, in purported exercise of the power in that behalf conferred on them, jointly and irrevocably appointed that the trustees should, from and after the execution of that indenture, stand possessed of the jewels specified in the third schedule to the settlement, in trust for the plaintiff F. T. Penton, his executors administrators and assigns absolutely, discharged (if and so far as the incumbrances therein referred to were charged on the said jewels or any of them) so far as might be from such incumbrances and so that, from and after the execution of the now stating indenture, all such incumbrances should, as between the other property charged therewith and the said jewels be charged exclusively upon such other property in exoneration of the jewels. On December 12, 1923, an originating summons was taken out by the plaintiffs asking that it might be declared that, according to the true construction of the said settlement, the trust thereby declared to allow the jewels specified in the third schedule thereto to devolve and be enjoyed, so far as the law would permit, as heirlooms along with the hereditaments thereby settled, conferred on the plaintiffs a joint general power of appointment by deed of the said jewels corresponding with but exercisable independently of the joint general power of appointment by deed of the said hereditaments thereby conferred on the plaintiffs.

Stafford Crossman for the plaintiffs. Under the first limitation in the settlement the plaintiffs have a general overriding power of appointment over the settled hereditaments, and I contend that the appointment of the jewels is good. By cl. 45 there is also a special power given to tenants for life entitled to the possession of the jewels to appoint that a wife who survived him might have the use of the jewels. There is no case in point on a separate appointment of heirlooms. In *Countess of Harrington* v. *Earl of Harrington* (1) Lord Westbury said that the words of the clause in

(1) (1871) L. R. 5 H.L. 87, 101.

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that case relating to the personalty amounted by implication to a declaration of such trusts of the personalty as corresponded with the ownership of the realty, and secured its transmission with the realty up to the limit of time allowed by the rule against perpetuities.

Such a general power to appoint the jewels can be implied here by inference. In *In re Parker* (1) there are observations by Parker J. as to the effect of a clause where chattels were directed to pass as heirlooms with real estate. It is clear that if these jewels were sold under the Settled Land Acts the proceeds of sale would be subject to the power of appointment. The meaning and effect of the word "heirlooms" is also dealt with by Chitty L.J. in *Hill* v. *Hill*. (2)

R. L. Ramsbotham for the trustees of the settlement.

R. M. Pattisson for the infant remainderman. I submit that the appointment by the plaintiffs of the jewels was wholly bad. The only power of dealing with the jewels separately is that given by cl. 45 of the settlement enabling a male person entitled to the possession of the jewels to appoint the use and enjoyment of them to any wife surviving him.

[EVE J. What would be the devolution of the jewels if the father and son exercised their joint power of appointment over the realty ?]

I submit that in such a case the jewels would be held by the trustees in trust for those who would take according to the uses and limitations of the settlement of the realty, as in default of the exercise of the over-riding power. There is no express general power to appoint the jewels separately from the settled hereditaments; the intention was that the jewels should not be divorced from the hereditaments.

It is also impossible to imply a power of appointment over these jewels. There is no case directly in point. *In re Duke of Marlborough's Settlement* (3) was a case under the Settled Land Act, 1882, and there it was held that moneys resulting from the sale of chattels settled as heirlooms might be applied

(1) [1910] 1 Ch. 581, 584.
(2) [1897] 1 Q. B. 483, 494.
(3) (1885) 30 Ch. D. 127; (1886) 32 Ch. D. 1.

in discharge of incumbrances affecting the inheritance of the settled land. Another recent case on heirlooms is *In re Fowler*. (1)

Stafford Crossman in reply. The form of settlement of the chattels as heirlooms in this case is taken verbatim from Key and Elphinstone's Precedents in Conveyancing, 11th ed., vol. ii., p. 799. He also mentioned *In re Duke of Marlborough and Governors of Queen Anne's Bounty*. (2)

Cur. adv. vult.

April 15. EVE J. [after stating the facts and reading the terms of the settlement and appointments continued :] The question raised by the summons is whether, under the trust contained in the settlement to allow the jewels to devolve and be enjoyed so far as the law permits as heirlooms along with the settled hereditaments, the plaintiffs have a joint general power of appointment over the jewels corresponding to, but exercisable independently of, their joint general power of appointment over the settled hereditaments.

The question is one of construction. Where chattels are settled as "heirlooms" simpliciter, or in more elaborate terms, to go along and to be used and enjoyed with the settled estates so far as the rules of law or equity will permit, or in other language sufficient to demonstrate the intention of the settlor that the possession and enjoyment of the personal chattels shall accompany the settled real estate through all the changes of ownership that may occur during the time allowed by law for postponing the absolute vesting of personal property, the single word or the more lengthy expressions amount in each case to a declaration by implication of such trusts of the personalty as correspond with the limitations of the realty, and in this and all other cases where the trusts of the personalty are not expressed in extenso, these trusts must be ascertained by reference to the limitations of the realty. In the settlement with which I have here to deal the first of these limitations is to such uses as the father and son by the exercise of the overriding power may

(1) [1917] 2 Ch. 307. (2) [1897] 1 Ch. 712.

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jointly appoint, and in considering whether a corresponding trust is to be implied in the case of the chattels, one is justified in inquiring what would be their devolution if father and son exercised their joint power over the realty, there being no such trust affecting the chattels? Would they be affected by the appointment of the realty? If so, how? If not, what would be their destination? When these questions were put to counsel for the respondent remainderman, he argued that the chattels would remain vested in the trustees in trust for those who would have taken under the limitations in default of the exercise of the overriding power, but that seems to me an impossible position, seeing that it would at once have disjoined and severed the chattels from the realty. In such circumstances as exist here, I think one is bound to import into the trusts of the chattels a general power of appointment corresponding with the first limitation of the realty as the only means of securing unity of ownership in the event of the realty being withdrawn from the settlement and the settlors desiring to maintain unity of ownership.

The question then arises, if such a trust is included in the trusts affecting the personalty, can it be construed in a qualified sense so as to be restricted in its application to occasions when the realty is being dealt with under the corresponding limitation? I do not see how it can be. The effect of the overriding power is to reserve to the settlors the right to withdraw from the settlement the whole or any part of the settled property, and in the absence of any express restriction the limitation of the realty and the trust of the personalty must, in my opinion, bear the same construction and may each be exercised separately.

I think the plaintiffs are entitled to the declaration for which they ask.

The costs as between solicitor and client will be paid out of any capital moneys in the hands of the trustees.

Solicitors: *Lee and Pembertons.*

G. M.

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J.
Nov. 5.
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In re DUTTON, MASSEY AND COMPANY.

Ex parte MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY, LIMITED.

[17 of 1922.]

Bankruptcy—Proof of Debts—Partnership—Administration of Assets—Assignment for Benefit of Creditors—Provision in Deed that Rules in Bankruptcy should apply—Guarantees given and Securities deposited by some of Partners individually to secure Debt of Firm—Proof against separate Estates of Partners—Liability of Creditor to value or give Credit for Securities—"Secured creditor"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 167, *Sch. II., r.* 19—*Deeds of Arrangement Act*, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 23.

The general rule in bankruptcy that, when a creditor seeks to prove against his debtor's estate, he must give up or value any security which if not retained by him would go to augment that estate, presupposes that the security is for the particular debt for which he seeks to prove, and does not apply to a case where the security is for a different debt.

Where, therefore, two of the partners of a firm deposited with the bankers of the firm securities which belonged to them individually to secure a joint debt of the firm, and also gave the bankers their separate personal guarantees up to a limited amount to pay the joint debt of the firm, and the firm subsequently, as debtors, executed a deed of assignment for the benefit of their creditors, which provided that in the administration of the joint and separate estates of the debtors the rules prevailing in bankruptcy should be followed:—

Held (by P. O. Lawrence J. and the Court of Appeal) that, as the bankers did not hold a charge on the securities so deposited for the debts due under the separate guarantees given by the two partners, and, therefore, were not "secured creditors" within the meaning of the definition in s. 167 of the Bankruptcy Act, 1914, in respect of those debts, they were entitled to prove for them under the trusts of the deed of assignment against the estates of the two partners without giving credit for the value of those securities.

APPLICATION made to the Registrar in Bankruptcy under s. 23 of the Deeds of Arrangement Act, 1914, and referred by him to the judge.

The firm of Dutton, Massey & Co., which carried on business at Norfolk House, Laurence Pountney Hill, London, and at Liverpool, as general merchants, consisted of three partners—namely, Charles William May Massey, Richard Kendall and Walter Massey.

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On April 1, 1921, Charles W. M. Massey executed a memorandum of deposit in favour of the Manchester and Liverpool District Banking Co., Ld., the bankers of the firm, of shares and debentures in a certain colliery company which belonged to him in his individual capacity to secure the payment to the bank of all sums of money which then were or should thereafter be owing to the bank by the firm or which the bank had or might become liable to pay on account of the firm. On the same date Richard Kendall executed a similar memorandum of deposit in the bank's favour of shares and debentures in the same colliery company belonging to him in his individual capacity for the same purposes. And on the same date those two partners joined in executing a third memorandum of deposit in favour of the bank and for the same purposes of a sum of War Stock which belonged to them jointly, but not as forming part of the partnership property.

On April 18, 1921, Charles W. M. Massey entered into a guarantee with the bank for the payment of all money (limited to 15,000*l.*, with interest thereon) then or to become due and payable to them by the firm, such guarantee to be deemed a primary security and in addition to any collateral or other security. And it was agreed that the guarantor would not at any time make any claim or proof or take any security in competition with the bank or which would prejudice the bank's claim on or dividend from any estate in respect of the debt of the firm so guaranteed. And on the same day Richard Kendall entered into a similar guarantee with the bank and limited to the same amount.

By a deed of arrangement dated November 16, 1921, Charles W. M. Massey, Richard Kendall and Walter Massey, the three partners composing the firm of Dutton, Massey & Co., as debtors, made a general assignment of the property of the debtors to Philip John Stephens as trustee for the benefit of the creditors of the debtors in proportion to their respective debts, in like manner in all respects as the property would be divisible under the law of bankruptcy if the debtors had at the time of the assignment been

adjudged bankrupt; and it was agreed that in the administration of the joint and separate estates of the debtors the trustee should follow and the creditors and the debtors should so far as circumstances admitted have the benefit of and be bound by the rules rights and equities which governed or prevailed in the administration in bankruptcy of the joint and separate estates of joint debtors, and it was thereby provided that if any creditor should hold any mortgage charge or lien on the property of the debtors or any part thereof as a security for a debt owing to the debtors, such creditor should be entitled to participate in the division of the estate of the debtors to the extent of the balance only of such debt after deducting the value of such security. That deed, which was registered under the Deeds of Arrangement Act, 1914, was assented to by the bank.

On April 27, 1923, the bank as creditors of the debtors forwarded their claim to the trustee of the deed of arrangement of November 16, 1921, claiming thereunder to prove against the partnership estate for the sum of 69,212*l.* 4*s.* 3*d.* without giving credit for the proceeds of sale of the securities deposited by Charles W. M. Massey and Richard Kendall under their memoranda of deposit of April 1, 1921, and further claiming to prove for the two several sums of 15,000*l.* with interest against the respective separate estates of Charles W. M. Massey and Richard Kendall without giving credit for the proceeds of sale of the deposited securities in arriving at the amounts of their provable claims against such separate estates. The trustee admitted the claim of the bank against the partnership estate; but rejected their claims against the separate estates of the two partners on the ground that no credit had been given therein for the proceeds of sale of the deposited securities. Accordingly, this application was made by the bank under s. 23 of the Deeds of Arrangement Act, 1914 (1), for the

(1) Sect. 23: "Any application by the trustee under a deed of arrangement, which either is expressed to be or is in fact for the benefit of the debtor's creditors generally, or by the debtor or by any creditor entitled to the benefit of such a deed of arrangement, for the enforcement of the trusts or the determination of questions under it, shall be made to the Court having jurisdiction in bankruptcy in the district in which

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determination of the question between the bank and the trustee and for a declaration that the bank were entitled to prove against the respective separate estates of Charles W. M. Massey and Richard Kendall for the sum of 15,000*l.* with interest in each case without giving credit for the proceeds of sale of the securities which had been deposited by those two partners for the purpose of securing the overdraft owing to the bank by the partnership firm.

The application was heard before P. O. Lawrence J. on November 5, 1923.

Hansell and *du Parcq* for the bank. The bank under the trusts of the deed of assignment are entitled to prove against the separate estates of Charles W. M. Massey and Richard Kendall for the sums of 15,000*l.* due under the guarantees without valuing or accounting for the securities which were pledged to secure the joint debt and for the joint debt only. The debts due from those two partners individually under their personal guarantees are, for the purposes of proof, debts separate and distinct from the joint debt of the firm. Although the guarantees relate to the payment of the joint debt and in that sense might be said to relate to one and the same debt, when the bank comes to prove, the debts under the guarantees are separate debts and the shares and debentures deposited are only security for the joint debt of the firm and are not security for the separate debts under the guarantees and need not be valued on the proof against the separate estates. According to the Bankruptcy Act, 1914, a secured creditor is only bound to value securities which he holds for the debt sought to be proved for. Here, there are two distinct debts, the joint debt and the separate debt created by the guarantee, and the securities pledged are not securities for the separate debt. According to the definition of "secured creditor" in

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the debtor resided or carried on business at the date of the execution of the deed:

"Provided that any question as to whether any person claiming to be a creditor entitled to the benefit of a deed of arrangement is so entitled may, subject to rules made under this Act, be decided either by the Court having such jurisdiction as aforesaid or by the High Court."

s. 167 of the Bankruptcy Act, 1914, he is a person holding a mortgage, charge or lien on the property of the debtor as a security for a debt due to him from the debtor, and the debt referred to there must be the debt in question. That the two debts of 15,000*l.* are separate debts is emphasized by r. 19 in Sch. II., the Bankruptcy Act, 1914 (1), which provides that where there are distinct contracts there are distinct and separate rights of proof. Each of the two partners who gave the guarantee is a sole contractor and also a member of a firm within the meaning of that rule. The bank may prove for the separate debts of the two partners under their guarantees against their separate estates and may prove for the joint debt of the partnership against the joint estate of the firm. The bank only have security for one debt, that is, the debt of the firm; and the fact that the securities which were pledged were the separate property of the partners does not render the bank liable to value them or give credit for them in proving against the separate estates of the partners. The bank have no security for the separate debts under the guarantees, and therefore have no security they can value in proving under the guarantees.

Clayton K.C. and *Tindale Davis* for the respondent, the trustee of the deed. The trustee was right in rejecting the claim. According to the rule in bankruptcy, which applies to this case, a creditor cannot prove against the separate estate of the debtor, whether for a joint debt or a separate debt, and retain securities on the separate estate against which he is proving, because if that security were given up it would go to augment the separate estate.

[P. O. LAWRENCE J. Have you found any case where a creditor has ever had to value or give up a security when proving for a debt which is not secured ?]

(1) Rule 19: "If a debtor was, at the date of the receiving order, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sale contractor, and also as member of a firm, the circumstances that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts."

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A creditor is not allowed to detract from the separate estate of one of the partners while he is retaining a security on his separate estate, whether the security be for the debt of the firm or for the debt of an individual partner; he must bring that security into account. Although each of the guarantees here is a separate guarantee, it is a guarantee for the debt of the firm. It is an agreement to pay (up to the limited amount) all money due or payable to the bank on any overdraft by the firm. Apart from the guarantees the partners are jointly liable for the debts of the firm, but they are not separately liable. Under the guarantees each guaranteeing partner became separately liable and may be separately sued. If a creditor is seeking to diminish the separate estate he may not retain anything which, if given up, would go to augment that estate. The determination of the questions whether a debt was a joint debt and whether the estates were joint estates for the purposes of administration in bankruptcy depended upon the old theory of a plea in abatement. That was the basis of Lord Loughborough's celebrated order in 1794. The partners jointly are a different legal entity from the members of the firm individually. They are considered jointly a community apart from the individuals who compose that community: *Ex parte West Riding Union Banking Co.* (1), where Sir George Jessel M.R. said: "A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves. That is the principle of the whole thing." Here the only question is, whether, if the security were given up, it would augment the estate. Every word of the judgment of the Master of the Rolls in that case is applicable to the present case.

P. O. LAWRENCE J. In this case I have come to the conclusion that the rejection of the proof of the bank was erroneous and ought to be reversed.

The bank have a claim against the joint estate for upwards of 69,000*l.* They also have a claim against the separate

(1) (1881) 19 Ch. D. 105, 112.

estate of each of the two partners for 15,000*l*. The joint debt is secured by, amongst other things, certain stocks, shares and debentures held by the two partners individually. The indicia of title to those stocks, shares and debentures were deposited with the bank under certain memoranda of deposit, which clearly show that they were a security for the joint debt alone and for nothing more. That being so, the bank say, and, in my opinion, say rightly, that there is owing to them an unsecured debt of 15,000*l*. by each of the two partners in respect of which the bank are entitled to prove against the separate estate of each partner. It is contended by the trustee, however, that the bank are not entitled to prove against the separate estates of the partners for those unsecured debts without valuing and bringing into account the security which they hold for the joint debt, because part of such security consists of the property which would go to augment the separate estates. No doubt the general rule in bankruptcy is that when a creditor proves against the estate he must give up or value any securities which, if not retained by him, would go to augment the estate against which he seeks to prove. But the rule presupposes that the security held by the creditor is a security for the debt which he is seeking to prove. The rule has reference only to a proof by a secured creditor, that is to say, by a creditor who lodges a proof in respect of a debt which is secured on some property which, subject to the security, would go to augment the estate against which he seeks to prove. I have never heard it suggested, nor has Mr. Clayton been able to produce any case to show that a creditor is not entitled to prove for an unsecured debt without giving up a security which he holds on part of the debtor's property for a different debt altogether. It seems to me that that would be penalising a creditor in a way that was never intended by the bankruptcy law or by the bankruptcy rules. It is, of course, well settled that, where there are joint and separate estates and the creditor has a security for a joint debt on property forming part of the joint estate, he can prove against the joint estate on valuing or giving up his security and can also prove against

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the separate estates without bringing his security into account and vice versa. It seems to me to be an a fortiori case where the creditor has a claim against the separate estate for an unsecured debt and also a claim against the joint estate for a secured debt that he should be able to prove against the separate estate for his unsecured debt without bringing into account the property on which he holds a security in respect of his claim against the joint estate, although part of such property consists of the separate property of the debtors.

In the circumstances, I hold that the bank are right and that the proof for 15,000*l.* against each of the two separate estates must be admitted.

H. C. H.

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The trustee of the deed appealed. The appeal was heard on March 21, 1924.

Since the hearing of the application the name of the bank had been changed from that of the Manchester and Liverpool District Banking Co., Ld., to that of the District Bank, Ld.

Clayton K.C. and *Tindale Davis* for the appellant repeated the arguments used by them in the Court below.

Hansell and *du Parcq* for the respondent bank were not called upon to argue.

POLLOCK M.R. This is an appeal from a decision of P. O. Lawrence J., who on November 5, 1923, gave his decision, by which he declared that the bank were entitled to prove against each of the separate estates of C. W. M. Massey and R. Kendall for the sum of 15,000*l.* and interest thereon, and ordered the respondent, who is the trustee of the deed of assignment, to admit the proofs accordingly. The question which arises is whether or not in respect of those proofs the respondent would be entitled to make the bank bring into account a sum which may be taken at a round figure of 27,000*l.*

The facts were shortly these. There was a partnership which was composed of three partners, C. W. M. Massey, R. Kendall and Walter Massey, and in the course of their

business, and for the purpose of obtaining facilities from the bank, there had been deposited with them on April 1, 1921, by C. W. M. Massey and R. Kendall respectively, and by C. W. M. Massey and R. Kendall jointly, certain securities. The memoranda of deposit, which were all in the same terms, provided that the shares and debentures thereto attached were deposited by the two partners C. W. M. Massey and R. Kendall severally and in one case by them jointly, and were to be held by the bank as security for the payment of all sums of money which should thereafter be owing to the bank by the partnership firm. These two partners, therefore, had provided certain facilities which were placed to the advantage of the firm of Dutton, Massey & Co. It will be observed that Walter Massey did not make any such deposit. On April 18, 1921, C. W. M. Massey and R. Kendall respectively gave to the bank several guarantees for the purpose of guaranteeing the total sum to be advanced by the bank, but with a limit of liability in each case, that the guarantor should not be liable individually for more than the sum of 15,000*l*. On November 16, 1921, a deed of assignment for the benefit of creditors was entered into between the partners and their creditors, and P. J. Stephens was made the trustee thereof. The terms of that assignment were that, after getting in the assets, paying the costs and charges of the preparation of the deed and the preferential debts, the trustee was to apply the remaining assets in payment of the debts according to the rules of bankruptcy as if the debtors had at the date of the deed been adjudicated bankrupts. The deed was registered under the Deeds of Arrangement Act, 1914, which by s. 23 provides that any application for the determination of any question under such a deed shall be made to the Court having bankruptcy jurisdiction. The matter accordingly came before P. O. Lawrence J., and from him an appeal is brought to this Court.

The question which arises is this. There is a bankruptcy of the firm—I say a bankruptcy, because the assets are to be administered as if there were a bankruptcy of the firm, and the assets of the individual partners composing the firm are

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also to be administered as if they had each of them been made a bankrupt. The bank have proved against the firm for the advances made by them. In proving as they would do if there were a bankruptcy, they have to estimate and value the securities which they hold, and if there be a balance beyond the sum for which they hold security, the proof is to be for that balance; and in the case of the administration of the separate estates of the partners, the debts which are owing by them individually have to be ascertained, and if the creditors have a security against each or any of those late partners, those securities also have to be valued, and proof made in respect of the balance. What has happened here is this. The bank have held certain securities deposited with them by C. W. M. Massey and R. Kendall respectively on April 1, 1921, and they have also the guarantees which were given on April 18, 1921, by C. W. M. Massey and R. Kendall individually. What is said here is, that although the bank have a right to prove against the separate estates of these two late partners who gave the guarantees, there ought in some way to be taken into account the fact that the sums for which the guarantees were given were in part secured by the securities which had been deposited, and that the liabilities of the estates of these two partners ought not to be subject to the full proof of the 15,000*l.* on their respective guarantees without effect being given—to use a loose expression—to the fact that the bank were, as against the firm, placed in an advantageous position by reason of the securities which they held.

Now it is perfectly clear, and there is no controversy about it, that the assets of the firm and the assets of the individual partners have to be administered separately, as if the firm and each of the partners were separate entities. The whole question, as it seems to me, is whether or not the liability of the estates of these two partners is independent of that of the estate of the firm. We are told that both the estate of the firm and the estates of the partners are such that there will be no surplus on any of the estates; and that there is likely to be a deficiency, both in the estate of the

firm and the estates of the individual partners. Now can it be said that in respect of the proof of the bank against the separate estates of these two late partners for 15,000*l.* the bank are secured creditors? Mr. Clayton calls our attention to *Ex parte West Riding Union Banking Co.* (1) as laying down the rules which are to be followed in such a case. Sir George Jessel M.R. in the course of his judgment in the Court of Appeal there says (1): "The principles of the bankruptcy law are plain enough. A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves." It is clear from this rule, laid down and accepted, that the creditor is not entitled to prove and to retain securities which if given up would go to augment the estate against which he proves. Sir George Jessel then proceeds to extend that rule to the case where there has been a partnership, and he says that the question soon arose as to whether the separate estate of a partner, as apart from the partnership estate, was within the rule which enabled a man to prove for the full amount of his debt, without giving up his security, when the property pledged was that of a stranger, and he points out that it was once held that it was, that is to say, that the same rule applies as if the joint and separate estates were entirely different estates, estates of strangers, and that you cannot, by reason of the fact that there had been a partnership previously existing, introduce some different method or different system which would not apply to individual and separate bankruptcies. In the present case, what is suggested is that the bank ought not to be entitled to prove for the 15,000*l.* against the separate estates of C. W. M. Massey and R. Kendall under the guarantees which those two partners in the late firm gave without bringing into account the securities which the bank held in reference to the debts which, prima facie, are to be paid by, and in the first instance fall to be proved against, the estate of the firm; but, applying the rule laid

(1) 19 Ch. D. 105, 112.

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down by Jessel M.R. in *Ex parte West Riding Union Banking Co.* (1) the bank hold certain securities which they are bound to take into account in their proof against the partnership estate, and if they were to release those securities, which it is now suggested they ought to do, they would not go to augment the estates against which the proof falls to be made, that is to say, the estates of the individual partners against which the proofs under the guarantees are made, but would go to augment the estate of the partnership. The two matters are quite independent, and a "secured creditor," after all, under the rules of bankruptcies is a person who, by the interpretation clause (s. 167) of the Bankruptcy Act, 1914, holds "a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." In the present case, therefore, the secured creditor is one against whom two characteristics must be established: first, that he holds a security on the property of the debtor, and, secondly, that the security is in respect of a debt due to him from the debtor. Having regard to that definition, and to the rule laid down by Sir George Jessel, it appears to me that there is a confusion of thought in suggesting that there is not the absolute right on the part of the bank to prove against the separate estates of the debtors in respect of the liability created under the guarantees which were given by those debtors respectively. That liability is not to be confounded with what has been done with regard to that which belongs to the estate of the partnership: the partners and the firm are to be treated as entirely separate entities, and the suggestion now made is one to which effect cannot be given, by reason of the fact that there is no method by which a security which is appropriated, or belongs to, quite a different bankruptcy, can be brought in so that it may enure to the benefit of a different bankruptcy from that in which the particular proof is made. The learned judge has, in my judgment, come to a perfectly right conclusion, and on proper grounds, and I think that his judgment is right, and that this appeal must be dismissed with costs.

(1) 19 Ch. D. 105.

ATKIN L.J. stated the facts and continued: The rights of the parties seem to me to be entirely governed by the Bankruptcy Act, 1914, which depend, to begin with, upon Sch. II. thereto as to proof of debts by secured creditors. By r. 10 of that Schedule: "If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised"; and by r. 12: "If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed." The question that arises, therefore, is whether in respect of these proofs against the separate estates the bank are secured creditors. The definition of a secured creditor is that given by s. 167: "'Secured creditor' means a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." The words "from the debtor" were not in the Bankruptcy Act of 1869, which was the Act in operation in 1881 when *Ex parte West Riding Union Banking Co.* (1) was decided. Now, had the bank here a mortgage on the property of the debtors? I think it is plain that they had, because they held the securities, and they have a charge upon them, and those securities are the property of the separate debtors. But are they securities for a debt due to them from the debtors? I should have said quite clearly not. The bank held the securities for a debt due, not from the separate debtors, but from the firm, and unless "due from the debtor" can be read as "taken from the debtor either alone or jointly," the matter seems to me to be disposed of merely by a consideration of that definition. I have no doubt that one of the reasons for the rule as to proof which has found its way into different Bankruptcy Acts—I have not traced the whole history of them—is that stated by the Master of the Rolls, that a creditor would not be allowed to prove against a bankrupt's estate

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and retain a security which if given up would go to augment the estate against which he proves. That may be the historical reason for it, but what we have to determine now is what is the construction of this particular Act? It appears to me, in view of the plain principles of bankruptcy law, in which a very clear distinction is drawn between the joint estate and the separate estate, and in which, for purposes of partnership, the two obligations are treated as separate, and indeed in view of the ordinary meaning of language, that "a debt due from the debtor" means a debt due from the debtor separately and severally, and does not mean a debt due from the debtor jointly with other persons. I think any opposite view would certainly lead to very anomalous results when one had to deal with a several debtor who alone became bankrupt. For these reasons, it appears to me that this case turns quite simply upon the plain construction of the Act of Parliament, and I think that the result arrived at by the learned judge is right, and that this appeal should be dismissed.

SARGANT L.J. I am of the same opinion. I agree with Atkin L.J. that the question really turns upon the construction of the phrase "secured creditor," which is defined by s. 167 of the Bankruptcy Act, 1914, as meaning "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." The position of the bank was this: They were secured creditors on the estate of the partnership by virtue of certain securities which had been given to them by the partnership, in respect of which they are giving credit, and they had this further advantage, that they held securities on the estates belonging to individual partners. There were three securities, one by each of the two partners individually and one by the two partners jointly, and in addition to these securities the Bank had a guarantee of the joint debt of the firm by each of two partners. We have only to consider whether they were secured creditors in respect of the guarantee given by each of the partners, because it is

only with the proof which the bank seek to lodge in respect of these guarantees given by each of the partners against their separate estates that it is contended that credit ought to be given to these partners for the results of the realization of the securities given by them and made subject to the partnership debt by the individual partners.

In my judgment, when the matter is looked at carefully, it seems perfectly plain that the security which was given by the two partners was not in any sense at all a security for the guarantee given by each of them, but was a guarantee simply and solely for the joint debt of the partnership. And when once that is appreciated, and also the fact that in these questions as to the administration of the joint and separate estates of partners, the partnership is to be regarded as a separate juridical entity from each of the partners individually, it seems to me to follow that there can be no obligation on the bank to give credit against the guarantee by each of the partners for a security which was given for the debt of a separate juridical entity—namely, the partnership. Of course it may be—and on this point I wish to reserve my opinion—that should it happen that by virtue of all their securities the bank should ultimately be in a position to receive more than twenty shillings in the pound on the joint estate, and should there therefore be some surplus from the joint estate to come back to help the separate estates of the partners, it is possible, in such an event, that the surplus of the security given by the partners for the joint debt, would be available for the purpose of diminishing the proof of the bank against the separate estates; but that is, as I understand, in this particular case quite impossible.

Appeal dismissed.

Solicitors for appellant: *Billinghurst, Wood & Pope.*

Solicitors for respondents: *Hickson & Parish, for Slater, Heelis & Co., Manchester.*

W. I. C.

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Burial Ground—"Disused burial ground"—Land conveyed to Burial Authority—Land Useless as Burial Ground—Proposed Exchange for New Ground—Power of Burial Authority to effect Exchange and to convey free of any Building Restriction—Burial Act, 1852 (15 *&* 16 *Vict. c.* 85), *ss.* 26, 28—*Burial Act*, 1853 (16 *&* 17 *Vict. c.* 134), *s.* 7—*Metropolitan Open Spaces Act*, 1881 (44 *&* 45 *Vict. c.* 34), *s.* 1—*Disused Burial Grounds Act*, 1884 (47 *&* 48 *Vict. c.* 72), *ss.* 2, 3, 5—*Open Spaces Act*, 1887 (50 *&* 51 *Vict. c.* 32), *ss.* 2, 4, *and Schedule—Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 8, *sub-s.* 2.

By s. 1 of the Metropolitan Open Spaces Act, 1881, as amended by the Open Spaces Act, 1887, s. 2, and Schedule, "The term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment." Sect. 4 of the Act of 1887 provides that in the Disused Burial Grounds Act, 1884, "burial ground" shall have that meaning, and that the expression "disused burial ground" shall mean "any burial ground which is no longer used for interments." Sect. 3 of the Disused Burial Grounds Act, 1884, provides that "it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship."

A Parish Council being the duly constituted burial authority for the parish took from the plaintiff, in consideration of a covenant to redeem the tithe rent charges charged on the land being conveyed and on adjoining land retained by the plaintiff a conveyance of land "to hold the same .... according to the true intent and meaning" of the Burial Acts. The land proved unfit and was never used for interments, and it was never fenced off or consecrated, nor did it adjoin any burial ground. The Council agreed with the plaintiff, with the approval of the parish meeting, to exchange the land for other land suitable for use as a burial ground:—

Held, that (1.) the land first acquired by the Council had never been "set apart for the purposes of interment" and was not therefore a "disused burial ground," so as to be subject to the restriction imposed by s. 3 of the Disused Burial Grounds Act, 1884; and (2.) the Council had power to effect the exchange by virtue of the powers to sell land not required for interments and to buy land for the purposes of interment conferred respectively by ss. 28 and 26 of the Burial Act, 1852, as extended by s. 7 of the Burial Act, 1853.

The correctness of the observations of Kay L.J. in *In re Ponsford and Newport District School Board* [1894] 1 Ch. 454, 467 and Bray J. in *In re Bosworth and Gravesend Corporation* [1905] 1 K. B. 403, 409 to the effect that land set apart for the purposes of interments is a "disused burial ground," although never used for interments, doubted.

SPECIAL CASE.

The Llantwit Major Parish Council (hereafter called "the Council") were the duly constituted burial authority for the parish of Llantwit Major in the county of Glamorgan, having, pursuant to s. 7 of the Local Government Act, 1894, adopted the Burial Acts, 1852 to 1900.

By a deed dated December 3, 1921, and made between the plaintiff of the one part and the Council of the other part it was recited that the plaintiff was desirous of making a gift of the hereditaments thereafter described to the Council for such purposes and subject to such provisions as were thereafter expressed and that the Council having been duly constituted a burial authority for the parish of Llantwit Major were desirous of accepting such gift of the said hereditaments and ot holding the same pursuant to the provisions of the Burial Acts and had agreed to execute such work upon the premises and perform such acts in relation thereto as were thereafter mentioned. The plaintiff then for the purpose of effecting the aforesaid desire and in consideration of the covenants by the Council thereafter contained conveyed to the Council a piece of ground situate in the parish of Llantwit Major containing two acres and twenty-six perches being part of fields Nos. 634 and 637 on the ordnance survey map of the parish "To hold the same unto and to the use of the Council their successors and assigns for ever according to the true intent and meaning of the said Acts." The Council then covenanted (*a*) within six months from the date of the deed to erect and forever thereafter maintain a fence along the east side of the land conveyed; and (*b*) within twelve months from the date of the deed to redeem the tithe rentcharges charged upon and paid in respect of the land conveyed and of the remainder of the said two fields retained by the plaintiff. This piece of land had never been fenced or consecrated and no interments had taken place there, it having been found impracticable to use it for the purposes of interments owing to the fact that the rock strata extended up to a short distance below the surface. Further, the piece of ground did not adjoin any other land used as a burial ground.

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By an agreement dated December 31, 1923, the Council agreed to reconvey the piece of land to the plaintiff free from all restrictions attaching thereto by reason of the same having been conveyed to the Council as a burial authority and to make such application to the Court as might be necessary to enable this to be done; and the plaintiff thereby agreed in exchange therefor to convey to the Council another piece of land for use as a burial ground. This agreement was made with the consent of the parish meeting.

The parties were in doubt whether the relevant statutory provisions operated to prevent the reconveyance to the plaintiff of the piece of land free of all restrictions as to the user, and the question was submitted to the Court on a special case stated by consent pursuant to Order XXXIV.

Clause 7 of the special case set out the relevant statutory provisions as follows:—

"The Metropolitan Open Spaces Act, 1881, s. 1, provides as follows: 'The term "burial ground" shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment and in which interments have taken place since the year 1800.'

"The Disused Burial Grounds Act, 1884, s. 3, provides that 'After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging the church, chapel, meeting house or other places of worship.'

"By s. 2 that 'In this Act a "disused burial ground" shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein.'

"By s. 5 that 'Nothing in this Act shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament.'

"The Open Spaces Act, 1887, provides by s. 4 as follows: 'In the Disused Burial Grounds Act, 1884, and this Act, the expression "burial ground" shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by this Act, and the expression "disused burial ground" shall

mean any burial ground which is no longer used for interments whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council.'

"And by the effect of s. 2, sub-s. 1, and the Schedule the following words in s. 1 of the said Metropolitan Open Spaces Act, 1881, occurring in the definition of a burial ground, are repealed—namely, the words 'and in which interments have taken place since 1800.'

"By the Local Government Act, 1894, s. 8, sub-s. 2, the defendant Council is authorised with the consent of the parish meeting to sell or exchange any land vested in the Council."

The question submitted to the Court was whether on a conveyance by the plaintiff to the Council of certain freehold hereditaments situate in the parish of Llantwit Major in exchange for the freehold hereditaments conveyed to them by the conveyance of December 3, 1921, the Council would be empowered under the statutes in that behalf to reconvey to the plaintiff the last-mentioned hereditaments free from all restrictions.

Church for the plaintiff. There is no power for the Council to reconvey this land freed from the restriction on building imposed by s. 3 of the Disused Burial Grounds Act, 1884. In order that ground should be a disused burial ground it need only have been set apart for interments and it is immaterial that no interments have actually taken place there. This is so by virtue of the definition of "burial ground" in s. 1 of the Metropolitan Open Spaces Act, 1881, as amended by s. 2, sub-s. 1, of and the Schedule to the Open Spaces Act, 1887, and the definition of "disused burial ground" in s. 4 of the last-named Act: *In re Ponsford and Newport District School Board.* (1) The judgment in that case of Kay L.J. is to the effect that a disused burial ground means "a piece of ground set apart for interments in which interments have or have not taken place." Here the deed of gift operated as a

(1) [1894] 1 Ch. 454, 466, 467.

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setting apart of the piece of ground conveyed as a burial ground, and it is therefore subject to the provisions against building upon it imposed by s. 3 of the Act of 1884.

Watmough for the Council. Nothing has been done by the Council to set apart the ground as a burial ground. It is just an open field, and does not adjoin any existing burial ground. It is submitted that there is nothing in the relevant authorities to compel the Court to hold that any notional setting apart by virtue of the deed of conveyance is enough to make it a disused burial ground. *In re Ponsford and Newport District School Board* (1) is an entirely different case, for there the land in question formed part of a cemetery that had been used for interments though none had been effected in this particular portion of it. The part of the judgment of Kay L.J. relied upon is purely dictum and is based on a mistaken reading of s. 4 of the Act of 1887, which Kay L.J. says (1) defined the expression "disused burial ground" as any burial ground " which is not used for interments " instead of " which is no longer used for interments." This misquotation affects greatly the meaning of the definition. Unfortunately, this dictum appeared as a decision in the headnote and was accepted as such in *In re Bosworth and Gravesend Corporation* (2) and *In re Ecclesiastical Commissioners and New City of London Brewery Co.'s Contract* (3); but in neither case was it a necessary part of the decision. It is submitted that ground cannot be a " disused burial ground " within the meaning of s. 4 of the Act of 1887, unless interments have taken place in the ground, but have ceased to do so, so that it is " no longer " used for interments.

Even however if that be not so, there has here been no setting apart for interments within s. 1 of the Metropolitan Open Spaces Act, 1881. No physical act has been done on the land to set it apart, and a mere notional setting apart is not sufficient.

Lastly, under s. 28 of the Burial Act, 1852, the operation of which was extended by s. 7 of the Burial Act, 1853, to the

(1) [1894] 1 Ch. 454, 467.
(2) [1905] 1 K. B. 403, 409; [1905] 2 K. B. 426.
(3) [1895] 1 Ch. 702, 711.

whole country, the Council have power, with the approval of the parish meeting, to sell land purchased by them under s. 26 of the Act of 1852 which is not required for interments. It is submitted that here the land was in fact purchased, as the Council in return for the conveyance of the land to them covenanted to redeem the tithe rentcharges charged upon not only the land conveyed but other land retained by the plaintiff. The Council having power then to buy land for the purposes of interments and to sell land not required for those purposes, they can effect the double transaction by an exchange. Further the powers of sale and exchange conferred by s. 8, sub-s. 2, of the Local Government Act, 1894, apply to land acquired by the Council for purposes of interments after they had adopted the Burial Acts pursuant to s. 7 of the Act of 1894; and on a sale or exchange under these statutory powers s. 5 of the Disused Burial Grounds Act, 1884, would apply, so that the land could be sold free of the building restriction imposed by s. 3 of that Act. See *In re Howard Street Congregational Chapel, Sheffield.* (1)

Church in reply. Sect. 28 of the Burials Act, 1852, does not apply, for the proposed transaction is not a "sale and disposition"; and s. 8, sub-s. 2, of the Local Government Act, 1894, is not intended to apply to lands acquired under the Burial Acts. Again the deed of gift provided that the land should be used for the purposes of the Burial Acts, and that amounts to a setting apart for the purposes of interments. If so, the observations of Kay L.J. in *In re Ponsford and Newport District School Board* (2) are directly in point, and the land is a disused burial ground and subject to the restriction on building imposed by s. 3 of the Disused Burial Grounds Act, 1884.

TOMLIN J. This is a special case stated for the opinion of the Court under Order XXXIV., and it raises an unusual point of some little difficulty. [His Lordship stated the facts and continued:] It has been suggested that there has fallen on the piece of land conveyed to the Council, which they are seeking to exchange for other land, something of

(1) [1913] 2 Ch. 690. (2) [1894] 1 Ch. 454, 467.

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the nature of a permanent blight, so that it can never more be used for any purpose which involves building by reason of the restriction against building imposed by the Disused Burial Grounds Act, 1884, upon a disused burial ground. It would be a remarkable conclusion to come to, for this land has in fact never been allocated to or used for burials; and it would be an abuse of language to describe it as a disused burial ground, unless the expression has an artificial meaning at law. [His Lordship then read the relevant statutory provisions as set out in the special case and continued:] I have very little doubt that when the definition of "burial ground" in the Metropolitan Open Spaces Act, 1881, was amended by the Open Spaces Act, 1887, it was intended by this modification to provide that all grounds which had been set apart for interment and in which interments had at any time taken place, whether before or since the year 1800, should be burial grounds within the definition; and if that were so, it might well be that the definition of "burial ground" would not include a ground set apart for burials in which in fact no burials had ever taken place. But whether that be so or not, I am satisfied that in this particular case the land with which I am dealing has never at any time been set apart for the purposes of interments within the meaning of s. 1 of the Act of 1881. It was, in my opinion, never set apart nor was any beginning ever made in setting it apart for the purposes of interments. I think that the expression "set apart" refers to an actual physical setting apart. I therefore come to the conclusion that this was not a burial ground within the definition, and if not, still less is it a disused burial ground, and therefore the prohibition against building on a disused burial ground does not apply to it.

I may add that with reference to the definition of "disused burial ground" in s. 4 of the Act of 1887 my attention has been called to observations on it in *In re Ponsford and Newport District School Board* (1) and *In re Bosworth and Gravesend Corporation*. (2) The facts in both these cases were entirely different, and it does not seem to me that the particular

(1) [1894] 1 Ch. 454, 467. (2) [1905] 1 K. B. 403, 409.

observations to which I was referred were directed to anything material to the determination of those cases; and for my part I should not be prepared to accept without much more argument the view that the definition of a "disused burial ground" as a "burial ground which is no longer used for interments" can include a burial ground which has never been used for interments. It is not however necessary for me to determine this in view of the conclusion I have arrived at on the facts.

The only question that remains is what are the powers of disposition of the Parish Council in reference to this land, they not having set it apart for interments? Plainly there is power to sell it under s. 28 of the Burial Act, 1852, the operation of which is extended by the Burial Act, 1853, to the whole of England. It was, in my opinion, acquired by them by means of a purchase under the Acts, and if so they have power to sell it under that section. It may be that they also have power to sell it under s. 8, sub-s. 2, of the Local Government Act, 1894, in view of their having adopted the Burial Acts under s. 7 of that Act; but assuming that their powers are confined to those conferred by s. 28 of the Act of 1852 they stand in the position that they have on the one hand power to acquire land for the purpose of a burial ground and on the other power to sell land acquired but not required for that purpose. I have no doubt that a person having these two powers and giving effect to them by way of an exchange would be found to be acting intra vires and would be held to confer a good title in respect of the land so disposed of. It is inconceivable that an exchange could be held to be bad, when the party on each side of the transaction has power both to sell and to purchase. There was therefore power for the Parish Council to enter into a transaction with the plaintiff, whereby the plaintiff disposed of part of his land and acquired the land previously conveyed to the Parish Council. It will be for the conveyancing counsel who advise the parties to put the transaction in the form they consider most suitable; but that there is power to carry out the transaction, I have no doubt.

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It may also well be—and my view is—that as the Council have adopted the Burial Acts the powers of sale and exchange conferred by s. 8, sub-s. 2, of the Local Government Act, 1894, extend to land vested in them under the Burial Acts. In one way or another therefore I am of opinion that the transaction can be properly carried out and that a good title to the land reconveyed free from any restriction imposed by s. 3 of the Disused Burial Grounds Act, 1884, will be conferred on the plaintiff.

Solicitors: *Taylor, Rowley & Lewis, for J. C. Llewellin & Co., Newport, Mon.*

H. C. G.

P. O. LAWRENCE J.
1924
Feb. 20.

In re HORN'S ESTATE.

PUBLIC TRUSTEE *v.* GARNETT.

Tenant for Life and Remainderman—Trust Funds invested on Mortgages of leasehold Properties under Power in Will—Bankruptcy of Mortgagor—Foreclosure by Trustees—How net Rents of Properties foreclosed should be dealt with—Conveyancing Act, 1911 (1 & 2 *Geo.* 5, *c.* 37), *s.* 9, *sub-ss.* 1, 2.

Where trustees, under a power in a will, have invested trust funds on the security of mortgages on leasehold properties, and have, on the bankruptcy of the mortgagor, foreclosed, the effect of s. 9 of the Conveyancing Act, 1911, is to place the property which has been foreclosed so far as practicable in the same position as if it had originally formed part of the estate of the testator.

Trustees, acting under a power in a will, invested trust money on the security of nine mortgages on nine leasehold properties. The mortgagor having become bankrupt, the trustees foreclosed. Four of the properties were sold, leaving five unsold. In the case of two, the net rent exceeded the amount of the interest on the mortgage. In the case of two others the net rent was about equal to the former interest, and in the case of the remaining property, the net rent was less than the former interest:—

Held, that the tenant for life was entitled to the whole of the net rents, pending the sale of the properties; but that, if during that period the net rents amounted to less than the amounts he would have received by way of interest on the mortgages, he would not be entitled to claim any part of the proceeds of sale.

By his will dated April 1, 1882, the testator Richard Horn devised and bequeathed the residue of his estate to his

trustees upon trust for sale, and conversion into money as therein mentioned, and out of the proceeds to pay his debts, funeral and testamentary expenses and pecuniary legacies, and to invest the residue of such proceeds as therein mentioned, including investments on leasehold securities, and to stand possessed of such residuary trust money in trust to pay the income thereof to his children during their lives in equal shares, and after their decease upon trust as therein mentioned. The testator died on December 30, 1883. In exercise of the power contained in the will, the trustees, between the years 1891 and 1899, invested nine sums of money forming part of the trust estate and amounting in the aggregate to the sum of 8305*l.* on the security of mortgages of leasehold properties held for long terms of years. The mortgagor having become bankrupt, the trustees foreclosed in December, 1915. There were originally nine mortgages of nine separate properties. Since the foreclosure four of the nine properties had been sold, but five still remained unsold. In the case of two of the five properties which remained unsold, the net rent of the property exceeded the amount of the interest on the mortgage debt formerly secured on the property. In the case of two of the five properties, the net rent of the property was about equal to the amount of the former interest. In the case of one of the five properties, the net rent was less than the amount of the former interest. This summons was taken out by the plaintiff, who had been appointed a trustee of the will, and it raised the question whether, in the circumstances, the whole of the net rents of the five properties which remained unsold ought, while they remained unsold, to be treated as income, or whether any part thereof ought to be treated as capital.

R. M. Pattisson for the plaintiff. The question to be decided here turns entirely on s. 9 of the Conveyancing Act, 1911 (1), and more especially on the meaning of the proviso to sub-s. 2.

(1) By the Conveyancing Act, 1911, it is provided, s. 9: "(1.) Where any property, vested in trustees by way of security, becomes by

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Stafford Crossman for two tenants for life. Either the whole of the net rents must be paid to the tenants for life, or only so much as is equal to the amount of interest that would have been payable on the mortgages, the surplus being added to capital. The earlier part of sub-s. 2 of s. 9 of the Conveyancing Act, 1911, clearly gives the tenants for life the right to receive the whole of the net income of the properties from the date of the order for foreclosure until sale, and the proviso to the sub-section does not affect that right. There is no rule of law relating to the apportionment of capital and income between tenant for life and remainderman which affects the income of mortgaged property after foreclosure. The rule of apportionment in certain cases is laid down in *In re Atkinson* (1), and the object of the proviso to sub-s. 2 is to save such a rule of law, but that rule does not apply here. Tenants for life cannot claim any arrears after the date of foreclosure: that follows from their being entitled to the full net rents under s. 9.

Turnbull for an infant remainderman. The tenant for life is not entitled to more than the amount he would have received by way of interest on the mortgage debt. If the net rents come to more than that, the surplus must be added to capital: *In re Coaks.* (2) On the other hand, if the tenant for life does not, between foreclosure and sale, receive the full amount he would have received by way of interest on the mortgage debt, he is entitled to apportionment on sale. The effect of sub-s. 2 of s. 9 is to keep the rights of the tenant for life and remainderman as if the mortgages had remained on foot. The trustees ought not to have

virtue of the statutes of limitation, or of an order for foreclosure or otherwise, discharged from the right of redemption, it shall be held by them on trust for sale, with power to postpone such sale for such a period as they may think proper. (2.) The net proceeds of sale, after payment of costs and expenses, shall be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable; but this sub-section shall operate without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman."

(1) [1904] 2 Ch. 160.

(2) [1911] 1 Ch. 171.

the power, by foreclosing, to alter rights as between the parties.

Stafford Crossman in reply. *In re Coaks* (1) does not apply here. There had been no foreclosure in that case.

P. O. LAWRENCE J. This summons raises the point whether under s. 9, sub-s. 2, of the Conveyancing Act, 1911, the tenants for life under the testator's will are entitled to receive the whole of the net rents of certain leasehold properties which were formerly vested in the trustees by way of security, but have become discharged from the right of redemption by virtue of an order for foreclosure. [His Lordship stated the facts, and read s. 9, sub-ss. 1 and 2, and continued :] But for the proviso at the end of sub-s. 2, it is plain that after the order for foreclosure the properties in question would have been held by the trustees upon trust for sale with a power to postpone such sale, and upon trust until sale to pay the whole of the net rents to the tenants for life, who were the persons entitled to receive the interest on the mortgage debts formerly secured on the properties. Mr. Turnbull, however, on behalf of the infant remainderman contended that the effect of the proviso is that in every case in which the net rent of the property exceeds the amount of the interest on the mortgage debt formerly secured on the property, the tenants for life are not entitled to receive the whole of such net rent, but only a part thereof equal to the amount of the interest on the mortgage debt, and that the balance of such rent must be retained as capital.

I do not find that the cases to which my attention has been called lay down or recognize any rule of law relating to the apportionment of the income of property, which has become discharged from the right of redemption by virtue of an order for foreclosure. In *In re Coaks* (1) which was mainly relied upon by Mr. Turnbull, there had been no order for foreclosure ; the testator had gone into possession some time before his death, and the trustees of his will continued in possession ; there were arrears of interest owing to the

(1) [1911] 1 Ch. 171.

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testator at the time of his death, and the main question decided was that the rents were applicable in the first instance in discharge of such arrears which were a debt due to the testator, and therefore formed part of the capital of his estate. It was also incidentally held that, subject to such application, the rents ought to be applied in payment to the tenants for life of sums not exceeding the interest on the mortgage, and that any excess ought to be applied as capital. From the judgment of Warrington J. it appears plainly that the basis of his decision was the duty which the trustees owed to the mortgagor to apply the surplus rents, after payment of interest in arrear and current interest, in reduction of the mortgage debt. It is obvious that this duty furnished the true guide for the apportionment of the rents between tenant for life and remainderman, as the reduction of the mortgage debt effected in favour of the mortgagor by means of the surplus rents necessarily affected the remaindermen, and, if such surplus rents had been paid to the tenant for life, the remaindermen would suffer a loss of capital on the redemption of the mortgage by the mortgagor.

The question then arises, what is the meaning of the proviso to sub-s. 2 of s. 9 ? In my opinion the clear intention of s. 9 as a whole is to place property which has been foreclosed so far as practicable in the same position as if it had originally formed part of the estate of the testator, and had been devised or bequeathed by him upon trust for sale with a discretionary power to postpone such sale, and with a direction that the proceeds of sale should form part of the capital of his trust estate, and that the rents until sale should be dealt with as income. In these circumstances the meaning of the proviso that sub-s. 2 shall operate without prejudice to any rule of law relating to the apportionment of capital and income between tenant for life and remainderman is not very obvious. Some meaning, however, must be attached to that proviso, and I think that the true meaning is that suggested by Mr. Stafford Crossman—namely, that the earlier provisions of sub-s. 2 were not to prejudice any rights already acquired before the order for foreclosure, such as the right on

the ultimate realization of the property to have the proceeds apportioned in accordance with the rule of law which was recognized and definitely established in *In re Atkinson.* (1)

According to my view of the scheme of s. 9, notwithstanding the provisions of sub-s. 2, all proper apportionments which were or ought to have been made in respect of the rents received during the period preceding the order for foreclosure are not to be disturbed, and when the property is ultimately sold, if the net proceeds of sale amount to or exceed the aggregate of the amount of the interest on the mortgage debt on such property which was in arrear at the date of the order for foreclosure and of the amount of such mortgage debt, the tenant for life will be entitled to receive out of the net proceeds of sale the amount of such interest in arrear, and, if the net proceeds of sale do not amount to such aggregate, the tenant for life will be entitled to receive a proportionate part of the net proceeds of sale calculated in accordance with the rule laid down in *In re Atkinson.* (1) As from the date of the order for foreclosure the position is changed to this extent, that the trust fund is no longer represented by a debt, to the interest on which the tenant for life is entitled, but is represented by the property comprised in the mortgage, the net rents of which pending sale the tenant for life is entitled to receive. If this be the true view, no rule of law relating to the apportionment of capital and income between tenant for life and remainderman will be prejudiced, notwithstanding that, as from the date of the order for foreclosure, the tenant for life is entitled to receive the whole of the rents.

I can hardly imagine a case where the net rents would exactly equal the interest on the mortgage debt, and, if every excess of rent had to be added to capital, the income of the properties would not, in the terms of sub-s. 2, "be applied in like manner as the interest, if received, would have been applicable," and, if every deficiency of rents had to be compensated for out of capital, the proceeds of sale would not, in the terms of the sub-section, "be applied in

(1) [1904] 2 Ch. 160.

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like manner as the mortgage debt, if received, would have been applicable."

To accede to Mr. Turnbull's contention, therefore, would involve construing the proviso at the end of sub-s. 2 as practically rendering the directions contained in the earlier part of that sub-section nugatory. Such a construction in my opinion ought, if possible, to be avoided. If on the other hand the view I have expressed is right, effect is given to the earlier part of the sub-section, and at the same time a reasonable construction is placed on the proviso.

In the result, I am of opinion that the tenants for life are entitled to receive the whole of the net rents of the five properties in question from the date of the order for foreclosure until sale, although in two cases such rent exceeds the interest on the mortgage debt formerly secured on the property. It follows logically from this that the tenants for life will not, by reason of the net rent of one of the properties having since the date of the order for foreclosure been less than the amount of the interest on the mortgage debt formerly secured on such property, be entitled to claim any part of the proceeds of sale of such property when sold as compensation for such deficiency.

The order as drawn up, and so far as is material, is as follows: This Court doth declare (*a*) That the whole of the net rents and profits of the respective leasehold properties mentioned in the said order after payment of all outgoings properly payable out of such rents and profits for the period from the 17th December 1915 (when the said order dated the 17th December 1915 for foreclosure absolute was made) until such respective properties are sold ought to be treated as income of the residuary estate of the above named testator Richard Horn (*b*) That if the said net rents and profits from any such property during the period aforesaid are less than the interest which would have been payable under the mortgage thereon during the period aforesaid if such mortgage had not been foreclosed the persons entitled to the income of the respective shares of the testator's

residuary estate given in trust for his daughters respectively will not on the sale of such property be entitled to claim any part of the proceeds of sale of said property by reason of the amount of the net rents and profits during the period aforesaid being less than the amount of the interest during such period and (*c*) that if on the said 17th December 1915 the interest on the mortgage on any such property was in arrear then when such property is sold the persons entitled to the income of the said shares of the residuary estate will be entitled to receive a part of the net proceeds of sale to be ascertained as follows—namely (i.) if the net proceeds of sale amount to or exceed the aggregate amount of such interest in arrear on the 17th December 1915 of the principal sum secured by the mortgage on such property such part will be a sum equal to the amount of such interest in arrear on the 17th December 1915 but that (ii.) if the net proceeds of sale do not amount to this aggregate amount then such part will be a sum bearing the same proportion to the said net proceeds of sale that the amount of the said interest in arrear on the 17th December 1915 bears to the said aggregate amount.

Solicitors: *Lee & Pembertons.*

P. J. B.

LORD BUCK-MASTER for ASTBURY J.

1924

May 28.

In re CLOUT AND FREWER'S CONTRACT.

[1924. C. 164.]

Trustee—Disclaimer by Conduct—Thirty Years without Acting—Non-receipt of official Legacy.

An executor-trustee survived his testator for nearly thirty years without proving or acting or applying for or receiving a legacy given him in his official capacity. He had not, however, formally renounced or disclaimed:—

Held, that his conduct amounted to a disclaimer.

In re Gordon (1877) 6 Ch. D. 531, 534 and *In re Birchall* (1889) 40 Ch. D. 436, 438, 439 applied.

In re Uniacke (1844) 1 J. & Lat. 1 and *In re Needham* (1844) 1 J. & Lat. 34 doubted.

VENDOR AND PURCHASER SUMMONS.

By his will dated July 7, 1870, a testator devised and bequeathed his residuary real and personal estate to his wife Emma and Honton and Crick upon trust to convert and invest his personal estate in the trust securities therein mentioned and to pay the income to his wife for life for her separate use; and to stand possessed of his real estate upon trust to pay or permit his wife to receive the entire income thereof (after deducting all outgoings and repairs to the same) for her life for her separate use; and after her death to stand possessed of his residuary real and personal estate upon trust for sale and conversion. He appointed the same three persons his executors. He gave Honton and Crick nineteen guineas apiece as a small recompense for the trouble they might have in proving and acting in the trusts of his will.

The testator died on August 18, 1872, possessed and seised of pure personalty, leaseholds, and freeholds, including the freehold property hereinafter mentioned.

On September 4, 1872, probate was granted to the widow Emma, power being reserved of making the like grant to Honton and Crick, the other executors named.

These other executors did not formally renounce or disclaim, but neither of them ever proved, acted, or applied

for, or received his official legacy, the estate being cleared and administered by the widow Emma alone.

In December, 1882, the widow Emma married Snell.

On September 7, 1890, Honton died.

On December 25, 1897, Emma Snell, the sole proving executrix and acting trustee, died intestate, and on January 30, 1898, her husband Snell took out letters of administration to her estate.

By a deed of appointment of new trustees dated February 11, 1898, after reciting (inter alia) the death of Honton without ever having proved or acted in the trusts of the will and that Crick had never acted in those trusts, Snell as personal representative of Emma Snell the last surviving or acting trustee purported to appoint William Clout and Richard Clout new trustees of the will in the place of Emma Snell, Honton and Crick, and made a vesting declaration accordingly.

On November 13, 1899, Richard Clout died.

On January 18, 1901, Crick, the remaining non-proving executor, died.

On November 10, 1911, William Clout, the surviving trustee under the deed of appointment, died, having by his will dated January 18, 1907, appointed his wife, the vendor, sole executrix.

On November 26, 1923, the vendor agreed to sell certain freehold property held under the trust for sale to the purchaser, who paid a deposit. The will was made the root of title.

On examining the title the purchaser required evidence to show that Crick had in fact disclaimed the trusts. Otherwise, as he was alive on February 11, 1898, when the new trustees purported to be appointed, that appointment was inoperative, and the vendor had no title. The mere statement that Crick had not acted was insufficient to prove disclaimer in fact.

The vendor was only able to show that Crick had never proved, acted, or applied for or received his official legacy.

On January 11, 1924, the purchaser issued this summons

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for a declaration that his requisitions had not been sufficiently answered and that a good title had not been shown, and for an order for return of the deposit.

Mulligan for the purchaser. As Crick simply did nothing between the testator's death in 1872 and the appointment of new trustees in 1898 he must be presumed to have accepted the trusts during that quarter of a century : *In re Uniacke* (1) ; *In re Needham* (2); Lewin on Trusts, 10th ed., p. 214, 12th ed., p. 224; Godefroi on Trusts, 4th ed., p. 24 ; Halsbury's Laws of England, vol. 28, p. 85. The appointment of new trustees was therefore inoperative and the vendor has no title.

Henry Johnston for the vendor. In English law the presumption is obviously the other way : *In re Gordon* (3) ; *In re Birchall* (4) ; *Stacey* v. *Elph.* (5)

In the Irish cases, which were merely petitions for the appointment of new trustees, the trustees had no active duties to perform.

In the present case there were leaseholds to be converted into trust securities and real estate to be dealt with, and it would have been a flagrant breach of trust for Crick to have accepted these active duties and done nothing for nearly thirty years. The Court cannot make such a violent presumption as that, particularly when he never applied for or received his official legacy. His non-acting is proved by the recital in the 1898 appointment, which is over twenty years old.

Mulligan in reply. In *In re Gordon* (3) Jessel M.R. expressly said that the non-acting for three years, though strong, was not conclusive evidence of disclaimer. It was the additional fact of the renunciation coupled with the testator's creation of a mixed fund that enabled him to find disclaimer.

In *In re Birchall* (4) the executor-trustee had actually told the beneficiaries that he would never prove or act, and as he

(1) 1 J. & Lat. 1, 2.
(2) 1 J. & Lat. 34, 36 ; 6 Ir. Eq. Rep. 557.
(3) 6 Ch. D. 531, 534.
(4) 40 Ch. D. 436, 438, 439.
(5) (1833) 1 My. & K. 195.

was not called as a witness, this statement, coupled with his non-acting, was treated as a disclaimer.

In the present case the evidence, coupled with the recital in the deed of appointment, merely proves that Crick never proved or acted or applied for or received his official legacy. That is insufficient to prove disclaimer in fact.

LORD BUCKMASTER [after stating the facts]. This is a point of some difficulty, as the case lies between two classes of authorities, not easy to understand or reconcile, though equally binding on me.

In *In re Uniacke* (1) a settlement of February 24, 1821, was made, whereby a sum of 2000*l.* secured by bond was assigned to Rochfort and Townsend as trustees. Townsend did not execute the settlement. The 2000*l.* was afterwards invested in Government stock in the names of the two trustees. Rochfort died, and Townsend, who had never acted, declined to interfere. On a petition for the appointment of new trustees Sugden L.C. said: "It is said that the trustee never executed the deed; never acted, and now refuses to act; but after the lapse of time which has occurred since the settlement was executed, this person must be considered to have accepted the trust. The petitioner must, therefore, procure a transfer of the trust funds from him by the ordinary means."

It is difficult to understand why the lapse of time, about twenty-three years, influenced Sugden L.C. so convincingly, but that he was so influenced is manifest from the next case, where the period was thirty-four years.

In *In re Needham* (2) a testator died in 1810, having bequeathed a long term to Hall and other executor-trustees. Some executors proved, saving the rights of the others, but Hall declined to act. He survived the other executor-trustees. On a petition for appointment of new trustees Sugden L.C. made the appointment, but said: "Mr. Hall must assign the term of years to the new trustees; for after the lapse of such a number of years since the death of the

(1) 1 J. & Lat. 1, 2. (2) 1 J. & Lat. 34, 36; 6 Ir. Eq. Rep. 557.

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testator, without a disclaimer by him, I must presume that he accepted the trust."

In other words Sugden L.C. apparently considered that Hall's long period of inaction raised a presumption that he had accepted the office the duties of which he had neglected to perform, and according to a well-known text-book, Lewin on Trusts, 10th ed., p. 214, the longer the period of inaction the stronger this presumption is.

I find this view extremely difficult to accept or understand.

There are other authorities which afford some assistance.

In *In re Gordon* (1) an executor-trustee renounced probate and did not in any way act as trustee, but he did not execute a disclaimer. He died three years after the testator without acting. Jessel M.R. dealt with the disclaimer point separately as follows: "I think there was sufficient evidence of disclaimer. My reasons for saying so are these. In the first place we have this, that he never acted; that is a very strong circumstance, a man lives three years and does not act at all. It is a strong proof that he does not intend to act." That is directly contrary to Sugden L.C.'s view: "Of course it is not in itself conclusive, but it is evidence that he does not intend to act. But when we have the trusts of the will and the personal estate combined, the real estate to be sold and made a mixed fund, and to be applied with the personal estate in paying debts, legacies, and funeral expenses, and we find the same people appointed executors, and the gift of the personal estate is not to him except the direction to get it in and divide it, and then we find the trustee renouncing, it is conclusive evidence; he renounces execution of the will as to the personal estate, he cannot carry out the trusts as to the payment of the debts and funeral and testamentary expenses, as that is the executor's business, and the person who takes out the administration must perform it. He cannot, as I understand it, get rid of a part of his trust in this way. In other words, it is evident that he intends to have nothing to do with the will, and that he intends, in fact, to disclaim all the trusts; that is material evidence."

(1) 6 Ch. D. 531, 534.

This shows that the mere fact that a trustee does nothing for three years is strong, though not conclusive, evidence that he does not intend to act. Surely a longer period of inaction would be still stronger evidence.

In *In re Birchall* (1) an executor-trustee Ashton never proved or acted in the trusts of the will, and there was evidence that he had told the beneficiaries that he would do neither. But he never formally renounced or disclaimed. Nine years after the testator's death the sole acting trustee died, and the beneficiaries brought an action against Ashton in the Palatine Court for the appointment of new trustees. A few days later Ashton purported to appoint Healey a new trustee with himself, and Healey was then added as a defendant. Ashton was not called by either side, but Bristowe V.-C. held that the evidence of his non-acting and his statement was enough to prove disclaimer, and that his appointment of Healey was void. On an appeal brought by Ashton and Healey, Cotton L.J. said (2): "It is not necessary to say what my conclusion might have been if the evidence had come before us in the first instance. There was some evidence in favour of the conclusion at which the Vice-Chancellor arrived, that Ashton had never acted in the trusts or accepted the office of trustee, and he was not put into the witness box and asked whether he had ever acted. It is impossible for us in this state of circumstances to reverse the decision of the Vice-Chancellor on this point." Lindley L.J. said (3): "I am of the same opinion. There was evidence that Ashton had not acted, though he was not asked in the witness box whether he had done so. But the Vice-Chancellor had all the evidence before him, both words and conduct, and he came to the conclusion that Ashton had disclaimed the trusts, and I think I should have arrived at the same conclusion. . . . . All we know is that he said in the conversations, which were proved, that he had not accepted the trusts, and he was not asked in the witness box whether he had acted." Lopes L.J. was of the same opinion,

(1) 40 Ch. D. 436. (2) 40 Ch. D. 438.
(3) 40 Ch. D. 439.

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and said (1): "It was argued that there was no evidence of anything but conversation. But the subsequent conduct of Ashton in not acting for nine years must be taken into account. On the whole evidence I am of opinion that the Vice-Chancellor was justified in coming to the conclusion at which he arrived."

In the present case Crick survived the testator for nearly thirty years without proving, acting, or applying for or receiving his official legacy. In the circumstances I think that is sufficient evidence that he never intended to act, and disclaimed the trusts. There will consequently be a declaration that a good title was shown, and the purchaser must pay the costs.

Solicitors: *Ernest F. G. Oxley; Scott & Son.*

G. R. A.

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May 29.

In re ST. GERMANS SETTLED ESTATES.

[1923. S. 2331.]

Settled Land—Capital Money—Improvements—No Scheme—Previous erroneous Advice to Life Tenant that Capital could not be applied—Consequent Inaction by Life Tenant—Recoupment of Life Tenant's Executors—Delay—Discretion of Court—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 15.

In August, 1919, before ordering certain necessary improvements to the mansion house the life tenant asked the estate solicitors if they could be paid out of capital. The solicitors, forgetting that the statutory powers had been widely extended by the settlement, replied in the negative. The life tenant accepted this view and ordered the work at his own expense without any scheme, and notwithstanding a suggestion as to the applicability of capital in a subsequent letter of April, 1920, from one of the partners, who did not know of his firm's previous letter to the contrary, he not only made no claim for recoupment out of capital, but went on to pay the final instalment out of his own pocket on October 16, 1920.

In April, 1921, the life tenant met with a serious accident, and from that time until his death on March 31, 1922, he was unable to attend to business.

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(1) 40 Ch. D. 439.

On May 23, 1923, his executors applied for recoupment under s. 15 of the Settled Land Act, 1890 :—

Held, in the above circumstances, that the discretion under s. 15 ought to be exercised, and the application allowed.

In re Tucker's Settled Estates [1895] 2 Ch. 468, 471, 473 applied.

ORIGINATING SUMMONS.

Under a settlement of May 1, 1908, and in the events that happened, the St. Germans estate, including the mansion house at Port Eliot, stood limited in 1919 to the sixth Earl of St. Germans (hereinafter called "the late life tenant") for life, with remainder in the events that happened to the seventh earl, a bachelor of unsound mind (hereinafter called "the present life tenant") for life, with remainder to his sons in tail male, with remainder to Montague Charles Eliot for life, with remainder to his infant son Nicholas in tail male.

The Settled Land Act trustees were Ponsonby and Martin.

The Settled Land Acts' powers were extended as follows :—

Clause D : "Capital money arising under the Settled Land Acts, 1882 to 1890, or otherwise subject to these presents may be applied by the direction of a tenant for life of the premises hereby settled in or towards payment for an improvement authorized by those Acts or by these presents without any scheme being first submitted to or approved by any trustees or trustee and without an order of the Court and upon the certificate of any engineer architect or surveyor nominated or approved by the trustees or trustee that the work or operation or part thereof has been properly executed and what amount is properly payable in respect thereof."

Clause E : "Capital money arising under the Settled Land Acts, 1882 to 1890, or otherwise comprised in or subject to these presents may be applied in or towards payment for the following improvements hereby authorized on any hereditaments hereby settled, that is to say :—

"(1.) Erecting, reroofing, redraining, repairing, improving or rebuilding any house or other building or erection (including any mansion house or outbuildings or erection belonging thereto) or making any addition to or alteration in the same,

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whether structural or not, and whether necessary or not for the purpose of enabling the same to be let, and whether there is or is not any intention of letting the same, including (without prejudice to the generality of this clause) any water-pipes or cisterns or heating apparatus, and anything necessary for an electric light, or gas supply, and any other permanent convenience." . . . .

"(5.) The doing of any other work or the carrying out of any other operation on any part of the settled hereditaments which shall be certified to be of a lasting nature by some engineer, architect or surveyor nominated or approved by the trustees or trustee."

On August 12, 1919, the late life tenant finding that Port Eliot where he resided was inconvenient and expensive to maintain obtained an estimate from Garton & King, heating, lighting and sanitary engineers, Exeter, for the provision of central heating, additional bathrooms, additional water cisterns, and a new kitchen range, which were necessary improvements. The estimate came to just over 900*l.*, subject to any variation in prices.

On August 20, 1919, before any order for the works was given, the late life tenant's agent wrote by his instructions to Dawson & Co., the estate solicitors acting for the life tenant and the trustees, asking if the installation of central heating, bathrooms, new kitchen range, etc., at Port Eliot could be paid out of capital, as in the previous instance of Down Ampney House, and stating that the outlay would be approximately 1000*l.*

On August 21, 1919, in the absence of Mr. Wilson, the partner who attended to the estate matters, and without remembering the extended powers, the firm replied that the installation could not be paid out of capital, and that the Down Ampney House expenses were paid as necessary expenses in order that the house might be let (as specially provided for in the Act), which was not the case with Port Eliot.

As the improvements were imperative in order to make the place reasonably convenient for his use the late life

tenant directed them to be carried out, which was done during 1920.

On March 26, 1920, the late life tenant paid Garton & King, the contractors, 500*l.* on account.

On April 15, 1920, the contractors wrote to the then estate agent asking him to certify another 300*l.* on account, and pointing out that they had only the lavatory basin and heating boiler to complete.

On April 22, 1920, the late life tenant enclosed this letter to Wilson, pointing out the previous payment of 500*l.*, which with this 300*l.* would leave about 300*l.* to make up the total cost of about 1100*l.* He asked Wilson to instruct the bank to pay the 300*l.* if it was available.

On April 24, 1920, Wilson, who was not aware of his firm's previous letter, replied: "Thank you for your letter of the 22nd inst. If you will kindly sign and return the accompanying cheque for 300*l.*, I will pay Messrs. Garton & King. I will arrange with the bank to take the sum required off deposit. I have no particulars of the work you have been doing at Port Eliot, but it is quite possible that a considerable portion of it might be paid for by your trustees out of capital under the powers in the settlement if you so wish. I merely mention this in case you may not have had it in mind."

The late life tenant returned the cheque, but did not at any time reply to or mention the suggestions in this letter, nor did he give any direction to the trustees under cl. D. The improvements were completed in August, 1920, at a total cost of 1036*l.*, and on October 16, 1920, the late life tenant paid the final instalment of 236*l.*

Notwithstanding the improvements the late life tenant found that his income was wholly insufficient to enable him to live at Port Eliot, and on March 10, 1921, he moved to a smaller house. In April, 1921, he met with a serious accident and for the rest of his life was in bad health and unable to pay much attention to business matters. On March 31, 1922, he died, having by his will, dated August 3, 1918, appointed Ponsonby and the Earl of Leven and Melville his executors.

On May 23, 1923, the late life tenant's executors issued this

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summons for an order that the trustees might be directed to apply 1031*l.* out of capital money in their hands arising under the Settled Land Acts and subject to the settlement in repayment to the late life tenant's executors of the amount expended by him in his lifetime in the Port Eliot improvements, notwithstanding that no scheme was submitted to the trustees or the Court before their execution.

A few items amounting to 5*l.* out of the 1036*l.* actually paid were not claimed.

Luxmoore K.C. and *Bryan Farrer* for the late life tenant's executors, one of whom was a trustee of the settlement. The extension of powers under cl. E brings the improvements within the Settled Land Acts: Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 57. We can therefore apply for recoupment under s. 15 of the Settled Land Act, 1890.

Eardley Wilmot for Martin, the other trustee. I am neutral, and merely state that the trustees would probably have approved a scheme for these improvements; or they would have obeyed a direction under cl. D.

Ward Coldridge K.C. and *Andrewes-Uthwatt* for the present life tenant (appearing by his committee). Quite so. But the late life tenant never submitted a scheme or gave any such direction. He obviously abandoned any idea of throwing the expense on capital.

[LORD BUCKMASTER. He accepted the solicitors' statement that it could not be done.]

That was set right in April, 1920, a whole year before his accident. He nevertheless paid the final instalment in October, 1920, six months before his accident, and still made no application. He clearly gave up all idea of recoupment. His reasons for doing so are immaterial. He in fact made no claim in his lifetime, and the delay is fatal: *In re Allen's Settled Estate.* (1) The discretion under s. 15 cannot be exercised in favour of the executors of a life tenant who has made no claim.

[LORD BUCKMASTER. Unless the late life tenant abandoned

(1) (1909) 126 L. T. J. 282.

his right to recoupment I do not see why his executors should not enforce it.]

In any case the discretion under s. 15 must be exercised with the greatest care and vigilance. It is not enough to show that the improvements were authorized: *In re Tucker's Settled Estates.* (1)

Watmough for the infant remainderman in tail male. These improvements, however necessary, convenient and authorized under cl. E, are not really permanent and may well be exhausted or completely worn out before I come into possession. They are part of the ordinary incidents of occupation, and from a fair business point of view ought not to be thrown on capital under s. 15: *In re Tucker's Settled Estates.* (1)

Luxmoore K.C. in reply. There is nothing about delay in s. 15, and in *In re Allen's Settled Estate* (2) there were many reasons besides delay for refusing the application.

The right to recoupment does not necessarily cease at the life tenant's death: *In re Earl of Lisburne's Settled Estates.* (3)

These improvements were directly within cl. E, and would have been allowed under a scheme. The late life tenant would no doubt have directed payment out of capital under cl. D without any scheme, if he had not been misled as to his rights. In these circumstances the Court has merely to consider whether it is fair to allow them ex post facto: *In re Tucker's Settled Estates.* (1)

LORD BUCKMASTER [after stating the facts and pointing out that the late life tenant was misled as to his rights at the

(1) [1895] 2 Ch. 468, 471, 473.

(2) 126 L. T. J. 282. According to the present reporter's note the new laundry was not applied for under the Settled Land Acts at all, but as an improvement under a special power, and alternatively as a new building under *Drake* v. *Trefusis* (1875) L. R. 10 Ch. 364. On the judge objecting that it was a stale matter, three years old, it was pointed out that though ordered three years before the application, it was only just completed, but the application was not pressed and the judge did not see his way to allow it.

There was no satisfactory evidence as to the beast house, and the judge did not think the life tenant ought to ask repayment of such a small amount without a scheme. The net income was over 3000*l.* The coachman's cottage, the necessity for which was explained in the trustees' affidavit, was allowed.

(3) [1901] W. N. 91.

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outset, as the improvements were clearly within cl. E, and on obtaining a proper certificate he could have directed the application of capital money under cl. D without any scheme continued :] This is a summons by the late life tenant's executors, and as cl. D was not complied with it can only succeed under s. 15 of the Settled Land Act, 1890. The care and vigilance with which the Court ought to exercise its discretion under that section were considered in *In re Tucker's Settled Estates.* (1) It is not sufficient for the applicants to say that the improvements were in fact authorized improvements. Where no scheme has been submitted the Court must exercise a different sort of discretion. It must look at the matter from a business point of view and consider whether in all the circumstances it is fair and right as between life tenant and remainderman that the expense should come out of capital, or whether it was incurred in respect of things which are the ordinary incidents of occupation.

Bearing in mind, as I must, the provisions of the settlement it is my duty to consider what in the circumstances ought to be done.

I am much impressed by the infant remainderman's argument that these improvements, though adding to the comfort and convenience of the mansion house, will not last for ever, and it may well be that the benefit of the expenditure will have passed away before he comes into possession. That is a formidable argument, but I cannot shut my eyes to the fact that the settlement not only contemplated that improvements of this very nature should be paid out of capital, but enabled the life tenant expressly to direct such payment.

It is urged that the late life tenant, though originally misled by the solicitors' letter of August 21, 1919, must have known his rights on receiving Wilson's letter of April 24, 1920, and nevertheless lay by and did nothing. It is however impossible to know what the late life tenant thought of Wilson's suggestions in face of the clear negative in his firm's previous letter. Being in such financial difficulties that he had to leave Port Eliot for a smaller house, it is extremely difficult to

(1) [1895] 2 Ch. 468, 471, 473.

believe he knew that his expenditure on the improvements could be recouped out of capital.

On the whole I have come to this conclusion. Being definitely told by the estate solicitors that the improvements could not come out of capital, the late life tenant accepted this view to the end of his life, notwithstanding Wilson's suggestions.

In these circumstances I do not think that the delay disentitles me to exercise my discretion, and on the whole I think I ought to exercise it for the following reasons. The settlement itself contemplated that improvements of this very nature should be paid out of capital, if the life tenant so asked; and when the late life tenant was preparing to make that request the estate solicitors told him it would be useless to do so.

The application is therefore allowed.

Solicitors: *Dawson & Co.; Kennedy, Ponsonby, Ryde & Co.*

G. R. A.

In re GARDNER.

ELLIS *v.* ELLIS.

[1923. G. 3108.]

Will—Construction—Joint Tenancy or Tenancy in Common—Gift of Income to Grandchildren in equal Shares for their Lives—Gift to Children of deceased Grandchild (without Words of Severance) of Share of deceased Parent—Effect on Tenure of Gift of Clauses relating to Maintenance, Separate Use and Restraint on Anticipation.

A testator, who died in 1878, bequeathed his residuary estate to trustees upon trust out of the income thereof to pay certain annuities and to stand possessed of the surplus income upon trust to pay and divide the same among such of the children of his daughter Sarah as might be living at his death in equal shares for their lives, and after the death of any or either of those children leaving a child or children surviving such child or children were to be entitled to the share which would have been his her or their parents' if living. Upon the death of the survivor of Sarah's children his residuary estate was to be divided amongst their children living at the decease of such survivor. The will gave power to the trustees to pay and apply such parts as they

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should think fit of the income of the share or interest to which any minor taking any interest under the will should or might for the time being be entitled under the several trusts thereinbefore declared for or towards the maintenance, education or putting out in life of such minor in the meantime and until their respective shares and interests should become vested or payable. It was further declared that any interest given by the will to any person who might be or become a married woman should be for her separate use free from marital right or control without power for her to anticipate the same interests or any of them.

The daughter Sarah predeceased the testator having had five children all of whom survived the testator. Three of them afterwards died, and G. G. E., one of those deceased children, left him surviving four children. Upon the death in 1923 of one of those four children a question arose between the personal representative of that deceased child and the three surviving children whether the children of G. G. E. were entitled as joint tenants or as tenants in common to the share of the surplus income of the residuary estate during the lives of their aunts the two surviving children of Sarah:—

Held, that, upon the true construction of the will, the provision for maintenance did not apply to the interests of the four grandchildren of Sarah in their deceased parents' share in the income of the residuary estate during the lives of Sarah's two surviving children, but, semble, if that provision were so applicable, it would affect the construction of the gift of the income to those grandchildren, so as to make it a gift to them as tenants in common.

Held, further, that neither of the clauses as to separate use or restraint on anticipation had the effect of converting the prima facie construction of that gift of the income to those four grandchildren of Sarah as joint tenants into a gift to them as tenants in common.

ADJOURNED SUMMONS.

John Gardner by his will, dated March 24, 1875, after appointing executors and trustees thereof and making a specific bequest of some leaseholds, gave and bequeathed to his trustees all the residue of his leasehold estates and all money and securities for money and all other the residue of his estate and effects real as well as personal upon trust out of the rents dividends and annual profits to pay certain annuities during the respective lives of two annuitants, since deceased, and upon further trust that they should stand possessed of the surplus of the interest and dividends arising from his funded property and the annual produce of the rents issues and profits arising from his copyhold and leasehold property and from other his estate upon trust, subject to the payment of an annuity of 60*l*., to pay and divide the residue of the surplus of such interest dividends

and annual produce unto and among such of the children of his daughter Sarah Elizabeth Ellis as might be living at his decease in equal shares for their lives (or so long as the law would permit) and after the death of any or either of the said children leaving a child or children him her or them surviving such last mentioned child or children should be entitled to the share which would have been his her or their parents', if living, and upon the death of the survivors of his said grandchildren the whole of the residue of his property was to be divided among the testator's great-grandchildren living at the decease of such survivor. The testator declared that it should be lawful for the trustees at their discretion to pay and apply such part or parts as they should think fit of the rents, dividends and annual profits of the share or interest to which any minor taking an interest under his will should or might for the time being be entitled under the several trusts thereinbefore declared for or towards the maintenance and education or putting out in life of such minor respectively in the meantime and until their respective shares and interests should become vested or payable. And it was further declared that any interests given by the will to any person who might be or become a married woman should be for her separate use free from marital right or control without power for her to anticipate the same interests or any of them.

The testator died on May 28, 1878. His daughter Sarah Elizabeth Ellis predeceased the testator, having had five children, all of whom survived the testator. Three of them afterwards died, and the remaining two, namely, Emily Ellis and Edith Mary Eleanor Ellis, were still living. One of the deceased children of Sarah Elizabeth Ellis, namely, George Gardner Ellis, who died on January 4, 1923, left him surviving four children, namely, the defendants William John Ellis, George Gardner Ellis the younger, Ida Florence Ellis and Frank Bonham Ellis. Frank Bonham Ellis died on January 20, 1923.

The testator's residuary estate consisted of several freehold and leasehold houses and a sum of consols and some money

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on loan, together producing an annual income of about 620*l.*

Upon the death of George Bonham Ellis a question arose, whether the children of George Gardner Ellis were entitled as joint tenants or as tenants in common to his share of the surplus income of the testator's residuary estate during the lives of their aunts Emily Ellis and Edith M. E. Ellis and the life of the survivor of them. A summons was accordingly taken out by the trustees of the will to which William John Ellis, George Gardner Ellis the younger, and Ida Florence Ellis (the three living children of George Gardner Ellis the elder) and Florence Winnifred Ellis the widow and legal personal representative of Frank Bonham Ellis were defendants, for the determination of the question whether, upon the true construction of the will and in the events which had happened the one-fifth of the surplus of the interest, dividends and annual produce of the testator's residuary estate to which George Gardner Ellis the elder was entitled during his life, became upon his death and until the death of the survivor of the two surviving children of Sarah Elizabeth Ellis divisible amongst the four children of George Gardner Ellis the elder as joint tenants, in which case the share of Frank Bonham Ellis survived in favour of the other three children of George Gardner Ellis the elder, or as tenants in common, in which case the separate share of Frank Bonham Ellis passed to his legal personal representative.

Hodge for the trustees.

Bischoff for the three surviving children of George Gardner Ellis. The substitutionary gift to the children of George Gardner Ellis is a gift to them in joint tenancy. There is no sufficient indication in the will to change the character of the tenancy. The onus of showing such indication lies on those who allege a severance.

John W. F. Beaumont for the representative of Frank Bonham Ellis. Upon the construction of the whole will the four children of George Gardner Ellis were entitled as

tenants in common. Prima facie, they take as joint tenants, but there are sufficient indications in this will to show that those children took as tenants in common. First, the maintenance clause applies to the gift of the income during the lives of the two surviving children of Sarah Elizabeth Ellis, and the effect of the clause is sufficient to abrogate any notion of a joint tenancy: here, the clause applies to the income of a share notionally allocated to the minor, as, under the ultimate gift of the capital, such minor had a notional share in the capital fund from which the income was derived. There is a strong tendency towards construing a gift as creating a tenancy in common: *In re Woolley.* (1) The principle of *In re Ward* (2) applies a fortiori to a case where, as here, the whole property given consists of income only: it is analogous to a case of an advancement of capital. Secondly, it is submitted that the direction that any interest given by the will to a married woman should be for her separate use coupled, as it is here, with a restraint on anticipation is a sufficient indication of an intention to sever what would otherwise have been a joint tenancy: see the dictum of Joyce J. in *In re Woolley.* (1) The case of *Partriche* v. *Powlet* (3) shows that a gift to a married woman for her separate use is not inconsistent with her being a joint tenant; but, in that case, there was no restraint on anticipation. The imposition of a restraint on anticipation had the effect of placing the members of the class on an unequal footing, since the married women could not sever the joint tenancy by alienation. The interests of joint tenants must be not only equal and similar, but they must be one and the same: each has a concurrent interest in the whole of the property. The right of survivorship must be mutual: 2 Bl. Com. 184. Each joint tenant must stand in exactly the same position as the others, and anything which creates a distinction has the effect of either severing the joint tenancy or prevents it from arising: Challis' Real Property, 3rd ed., p. 367.

(1) [1903] 2 Ch. 206, 211. (2) [1920] 1 Ch. 334.
(3) (1740) 2 Atk. 54.

LAWRENCE J. 1924 GARDNER, *In re.* ELLIS *v.* ELLIS.

Bischoff in reply. The provision for maintenance is not applicable to the gift of the income to those children. The language of the provision shows that it is only applicable to the income of a share of capital. The decision in *In re Ward* (1) and the dictum of Joyce J. in *In re Woolley* (2) do not apply, because in both cases the members of the class took an interest in the capital; but, here, the interest is only an interest in income. If the provision does apply to the gift of the income, the application of the income for maintenance does not necessarily involve a severance, because the children are entitled, in any event, to be paid the income. In any case the application of income for maintenance ought not to be regarded as an indication of a severance of the capital from which the income is derived: *Crooke* v. *De Vandes* (3): the decision in *In re Ward* (1) ought not to be followed.

LAWRENCE J. The testator by his will, after directing his trustees to divide the surplus income of his residuary estate among such of the children of his daughter Sarah as might be living at his decease in equal shares for their lives, declared as follows: "after the death of any or either of the said children leaving a child or children him her or them surviving such last mentioned child or children shall be entitled to the share of income which would have been his her or their parents if living, and upon the death of the survivor of my aforesaid grandchildren the whole of the residue of my property is to be divided among my great-grandchildren living at the decease of such survivor." Pausing there, it is quite plain that upon any child of Sarah dying before the death of the survivor of the testator's grandchildren leaving children him or her surviving, such children take the share of income which the child of Sarah so dying would have taken, if living, as joint tenants. There are no words of severance in the gift of this share of income. Then, however, follow two clauses upon which Mr. John

(1) [1920] 1 Ch. 334. (2) [1903] 2 Ch. 206, 211.
(3) (1803) 9 Ves. 197.

Beaumont relied as showing that, upon the true construction of this will, as a whole, such children really take as tenants in common. The first is a maintenance clause; and the question arises whether that clause applies to the share of income taken by such children. It reads as follows: [His Lordship then read the clause and continued:] Now this clause is so expressed as to apply only to the rents, dividends and annual profits of "the share or interest" to which a minor should or might for the time being be entitled, that is to say, it applies only to the income of a minor's share of capital, and does not, on its true construction, apply to the share of income which the children of a child of Sarah take until the death of the survivor of the testator's grandchildren. If this view be correct, it follows that the clause is only applicable to the income of the shares which any infant great-grandchildren living at the decease of the survivor of the grandchildren may take in the capital. Mr. John Beaumont contended that this maintenance clause is one that does not fit into the scheme of the will and suggested that it may have been imported from some precedent containing a different scheme of disposition. This may well be the case, but even so, the Court has first to construe the clause according to the language employed and then see whether, if so construed, some effect can be given to it. Here, the clause is not meaningless unless construed so as to operate on the share of income in question, and therefore the Court is not at liberty to alter the meaning of it merely because it operates capriciously or because the Court suspects that the draftsman has blundered. In the result I am of opinion that the clause does not operate to convert that which on the face of it is a joint tenancy into a tenancy in common. If the clause had been so worded as to apply to the share of income in question, I am of opinion that its effect would have been to convert the apparent joint tenancy into a tenancy in common, because in order to enable the share of income to be applied for the maintenance of one or other of the class it would have to be divided up as between the various members of the class. The case of

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Crooke v. *De Vandes* (1) cited by Mr. Bischoff when arguing to the contrary, is in my opinion distinguishable. There it was held that severance of income of a share did not necessarily sever the capital, and consequently that on the true construction of the will in that case, although there was a severance of the income, yet the capital went to the beneficiaries as joint tenants. Here the very subject matter of the gift, the tenure of which is under consideration, is income, and, if the maintenance clause enables that income to be applied in maintaining one or other of the class, it naturally follows that there must be a severance. It is analogous to the case of an advancement clause in respect of capital which implies a severance of the capital so as to bring about a tenancy in common, because to the extent of the amount advanced the other members of the class take nothing by survivorship, a result which is inconsistent with the notion of joint tenancy.

I now turn to the second clause relied upon by Mr. John Beaumont, which is as follows: "I declare that any interests given by this my will to any persons or person who may be or become married women or a married woman shall be for their and her separate use free from marital right or control without power for them to anticipate the same interests or any of them." Mr. John Beaumont contended that the effect of the direction that the gift to married women should be for their separate use and the imposition of the restraint on anticipation was to create a tenancy in common in the income in question. When the summons was before me on the first occasion my attention was called to the decision of Joyce J. in *In re Woolley* (2), in which that learned judge is reported as having said that his reading of the words of the will in that case was established by the terms of the subsequent clauses in reference to maintenance and separate use. Having regard to his statement, I adjourned the hearing of this case in order to give counsel a further opportunity of investigating the authorities in order to see whether they could find any reported case where

(1) 9 Ves. 197. (2) [1903] 2 Ch. 206, 211.

a separate use clause had been held to convert a gift which, apart from such a clause, would have been one in joint tenancy, into a tenancy in common. Counsel have, in the meantime, looked into the matter, but they have been unable to find any such case. Mr. John Beaumont's industry has, however, resulted in his finding the case of *Partriche* v. *Powlet* (1) which, although to the contrary effect, he has very properly brought to my attention. That case shows that a declaration by a testator that married women are to hold the gifts taken by them for their separate use does not have the effect of converting a gift which in terms is one in joint tenancy into a gift in tenancy in common.

The last point taken by Mr. John Beaumont is that the imposition of the restraint on anticipation created a distinction between those members of the class who may happen to be married women and the other members of the class, and that, as one of the essential features of a joint tenancy is that the interest taken by every member of the class should be the same, the provision as to restraint on anticipation is an obvious indication that a tenancy in common was intended. I am unable to accede to that argument. I quite agree with the statement which has been cited from Blackstone's Commentaries as to the four essential requirements of a joint tenancy, and I also agree with Mr. Challis' comments on that statement, but I have never before now heard it suggested that a person who is under disability such as an infant, a person of unsound mind or a married woman restrained from anticipation, is not a perfectly competent member of a class of joint tenants. It is true that such a member by reason of his or her disability is placed in a less advantageous position than that of the other members in that it may be difficult or even impossible for such a member to sever the joint tenancy, but the interest taken by such a member is the same as that taken by the other members, although his or her power of disposing of such interest may be fettered or non-existent, and may therefore differ from that of the rest of the members. Such a difference, however,

(1) 2 Atk. 54.

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is not in my opinion inconsistent with the notion of joint tenancy.

In my judgment, therefore, the imposition of the restraint on anticipation in the present case does not convert what would otherwise be a joint tenancy into a tenancy in common. In the result I have come to the conclusion that there is nothing in the subsequent part of the will to displace the prima facie construction of the gift in question, and I propose to make a declaration that the share of income in question passed to the children of George Gardner Ellis as joint tenants.

Solicitors: *W. Ivanhoe Thomas; Williams & Poole.*

H. C. H.

TOMLIN J. 1924 *May* 15.

BATCHELOR *v.* MURPHY.

[1923. B. 5338.]

Lease—Option to purchase Freehold—Agreement for Surrender of Lease and Grant of new Lease for Residue of Term to new Tenants—New Lease to be "on the same terms and conditions in all respects" as the original Lease—New Lease not granted—Claim by new Tenants to Option to purchase.

By a lease dated October 17, 1913, premises were demised to a lessee for a term of 10½ years from October 6, 1913, at the rent therein mentioned. The lease contained an option for "the lessee" (which expression was defined as including the lessee, his executors, administrators and assigns) to purchase the freehold of the premises for 3000*l.* On May 22, 1915, the lessor died, having by her will appointed two executors. Subsequently the lessee was desirous of disposing of the residue of the term of the lease to the defendants and of freeing himself from all liability under the covenants in the lease, and an agreement was entered into in the form of a memorandum addressed to the proving executor by the lessee and the defendants. The memorandum was as follows: "In consideration of you agreeing to release me" (the lessee) "and accept us" (the defendants) "as lessees for the unexpired residue of the term in the lease dated the 17th day of October, 1913, ... we respectively agree as follows." Then followed provisions that the lessee should surrender the lease and that the defendants were "to execute a new lease for the unexpired term of eight years and six months from the sixth October last on the same terms and conditions in all respects as the lease of 17th October, 1913," with an exception as to the rent.

The defendants entered into possession of the premises, but no new lease was executed. They now claimed to exercise the option to purchase the freehold:—

Held, on the construction of the memorandum, that it only provided for a new lease containing the same tenancy provisions as the surrendered lease; and that as an option to purchase in a lease is not a term of the tenancy but a collateral bargain between the parties, the defendants had not acquired an option to purchase the freehold.

Sherwood v. *Tucker*, ante, p. 42, distinguished.

ADJOURNED SUMMONS.

By a lease dated October 17, 1913, Mrs. Susannah Candler Batchelor demised to Herbert William Clarkson a dwelling house shop and premises No. 17 Prince Street, Bridlington, for the term of 10½ years from October 6, 1913, at the rent during the first year of 100*l.* and thereafter at the yearly rent of 120*l.* In the lease Mrs. Batchelor was called the lessor, "which expression shall include her heirs and assigns where the context so admits," and H. W. Clarkson the lessee, "which expression shall include his executors and administrators and assigns where the context so admits."

The lease contained a covenant by the lessee not to underlet assign or part with the possession of the said premises without the previous written consent of the lessor. It also contained an option to purchase in the following terms: "In case the lessee shall during the term hereby granted give the lessor three calendar months' notice in writing of his desire to purchase the demised premises and shall have duly performed the covenants and agreements on the part of the lessee hereinbefore contained the lessor shall sell to the lessee the inheritance in fee simple in possession free from incumbrances of the demised premises at the price of 3000*l.* together with interest at the rate of 5*l.* per centum per annum on the said sum of 3000*l.* as from the date of the expiration of such notice and up to the time of completion. . . . . Provided Always that in case the lessor shall at any time during the term hereby granted give to the lessee or send to his last known address by registered letter three calendar months' notice in writing of her desire to terminate the option of purchase hereinbefore contained and the lessee shall not before the expiration of

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such three months give notice in writing to the lessor of his desire to purchase the demised premises in pursuance of the option given him as aforesaid this notwithstanding anything hereinbefore contained the said option of purchase shall upon the expiration of the notice given by the lessor absolutely cease and determine as though it had never been given."

On May 22, 1915, the lessor died, having by her will dated July 11, 1913, appointed John Henry Sawden and the plaintiff her executors. The will was proved by J. H. Sawden on September 23, 1915, power being reserved to the plaintiff to prove.

In November, 1915, the lessee was desirous of transferring the residue of the term of his lease to the defendants, and in order to carry this into effect J. H. Sawden prepared a memorandum, which was signed by the parties. It was as follows :—

" To John Henry Sawden, Executor of Susannah Candler Batchelor deceased.

" In consideration of you agreeing to release me the undersigned Herbert William Clarkson and accept us the undersigned Alfred Henry Murphy and Clementina Lucy Murphy as lessees for the unexpired residue of the term in the lease dated the 17th day of October 1913 and made between the said Susannah Candler Batchelor of the one part and Herbert William Clarkson of the other part relating to premises No. 17 Prince Street Bridlington we respectively agree as follows :

" The said Herbert William Clarkson to surrender the said lease.

" The said Alfred Henry Murphy and C. L. Murphy to execute a new lease for the unexpired term of eight years and six months from the sixth October last on the same terms and conditions in all respects as the lease of 17th October 1913 with the exception of the rent which until the cessation of the present hostilities shall be reduced to 82*l.* per year and during the remainder of the term at the rent reserved by the original lease. Dated the 17th day of November 1915.

" (Signed) H. W. Clarkson, Alfred Henry Murphy, Clem. L. Murphy."

The defendants then entered into possession of the premises, but no new lease was ever prepared or executed. On September 13, 1916, J. H. Sawden died, and on January 13, 1917, double probate of the will of Mrs. Batchelor was granted to the plaintiff.

On October 4, 1923, the defendants gave notice purporting to exercise the option to purchase the premises.

This summons was taken out by the plaintiff for a declaration that upon the true construction of the lease dated October 17, 1913, and the memorandum in writing dated November 17, 1915, the defendants were not entitled upon giving or having given to the plaintiff as legal personal representative of Mrs. Batchelor three calendar months' notice in writing of their desire to purchase the premises comprised in and demised by the lease to call upon the plaintiff as such legal personal representative to sell the inheritance in fee simple in possession free from incumbrances of the said premises to the defendants at the price of 3000*l.* with interest thereon at 5 per cent. per annum from the date of the expiration of such notice up to the time of completion or at any other price.

Bischoff for the plaintiff. The effect of the memorandum is that the defendants were to have a lease for the residue of the original term granted to the plaintiff on the same tenancy terms. The agreement with regard to the granting to the original lessee of an option to purchase was a mere collateral bargain and not one of the terms of the tenancy: *In re Leeds and Batley Breweries, Ld. and Bradbury's Lease.* (1) And the agreement by the memorandum for a lease for the unexpired term to the defendants " on the same terms and conditions in all respects as " the original lease would not involve granting in the new lease a new option to purchase. *Sherwood* v. *Tucker* (2) is a different case on the facts. There Astbury J. came to the conclusion that what had been agreed between the original lessor and lessee was for an extension

(1) [1920] 2 Ch. 548. (2) Ante, p. 42.

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of the original term of the lease with all its provisions, including the option to purchase, even though he recognized that this option was not a term of the tenancy.

[TOMLIN J. Prima facie an executor is not entitled to give an option to purchase.]

That is so; but of course the question on this summons is purely one of construction. Here the only agreement between the executor and the defendant to be found in the memorandum is an agreement to accept the lessees on the same tenancy terms.

H. Freeman (*Greene K.C.* with him) for the defendants. The whole object was to effect an assignment of the existing lease to the defendants in such a manner that the original lessee was relieved of all liability; and by the memorandum this was to be done by a surrender of the old lease and the grant of a new lease containing the same terms and conditions as the original lease. That shows that what was in contemplation was a continuation in all respects of the old lease with the insertion of new lessees. It is not a continuation only of the old tenancy. It is true that it would be irregular in an ordinary case for an executor to grant an option to purchase; but it is different in a case when the executor would be placing no additional fetter on the estate beyond what the testatrix had already placed upon it. The fetter would have been just as great if the benefit of the existing lease had been assigned by the lessee to the defendants. The only additional effect of the memorandum is to release the original lessee from liability under his covenants, and the question whether the executor could properly do this cannot affect the question in issue here.

Bischoff in reply. There is nothing in the memorandum imposing an obligation on the executor to give the defendants an option to purchase. All the executor agreed to do was to accept the defendants as lessees for the unexpired residue of the term.

TOMLIN J. [after stating the facts and reading the memorandum signed by the original lessee and the defendants

continued :] It seems to me plain that the lessee Clarkson was desirous not only of parting with the property to the defendants, but also of getting rid of his original liability as lessee, that the defendants were anxious to have the lease of the property for the remainder of the existing term and were willing to take on the liability of the original lessee in respect of it, and that the executor was willing that the arrangement should go through on the terms contained in the memorandum. The question is what on the true construction of the memorandum are those terms ? It is not immaterial to observe that if what was intended was merely the release of the original lessee from liability and the imposition on his assigns of the liability of original lessees, that was a matter which could have been effected without introducing the machinery of a surrender of the existing lease and the grant of a new lease. That is a consideration which I cannot wholly put out of mind in determining the true construction of the memorandum; I have to ascertain, as matter of construction, what is the new bargain between the lessor's personal representative on the one hand and the new lessees on the other hand, and, unless I can find in the memorandum something over and above a mere tenancy bargain, it is impossible for me to introduce into the new lease and to impose upon the lessor's estate the burden of the bargain to give effect to an option of purchase such as was contained in the original lease.

I may say at once that I accept the view that a covenant of this kind conferring an option to purchase is in the nature of a collateral bargain and not part of the terms of the tenancy in the strict sense.

The position is accurately stated by Peterson J. in *In re Leeds and Batley Breweries, Ld. and Bradbury's Lease* (1), and proceeding on that view of the law the question is whether I can find in the memorandum any agreement for the renewal of the option to purchase. I have come to the conclusion that I cannot do so, and my reasons for that conclusion may be stated in this way. First I cannot wholly put out of mind the nature of the machinery adopted. I must give some

(1) [1920] 2 Ch. 548.

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weight to that, and not unnaturally, having regard to that, I come to the conclusion that it was intended to create a new tenancy. If so, I cannot import into it any collateral bargain contained in the original lease unless an intention to that effect is expressed in the memorandum or arises by necessary implication from the language used in it. Secondly, I am conscious that much might be said in view of Sawden's position as executor of the lessor against a bargain entered into by him conferring an option of purchase upon new lessees. It might be argued that this was outside his powers altogether having regard to his duties as executor; and, although this is not a matter to which too much weight ought to be attached, still if there be an ambiguity in the memorandum the Court would prefer a construction which resulted in a transaction obviously within the executor's powers to a construction which resulted in a transaction liable to be questioned. So far I have been dealing with general considerations, but when I come to the language of the document itself I am unable to find anything in it compelling the executor to do more than accept the defendants as new lessees upon the tenancy terms upon which the original lease had been granted. It is to be observed that there is no clause in the memorandum which substantively imposes any obligation on Sawden at all. His obligation rests on this, that the other parties to the memorandum agree to do certain things in consideration of his releasing the existing lessee and accepting the defendants as tenants for the unexpired residue of the term of the lease. His obligation as regards the defendants is to accept them as persons who are bound to discharge the liabilities of lessees. It is not expressed as an obligation to accept them as persons entitled to rights outside those to which they would be entitled as lessees; and when we come to the obligation imposed on the defendants it is to execute a new lease for the unexpired term "on the same terms and conditions in all respects as the lease of 17th October, 1913." That is a provision which defines the terms on which the defendants are accepted as lessees. It imposes upon them the obligations and confers upon them the rights of lessees, but it does not purport to give them any collateral rights.

It follows that the option to purchase does not continue to exist for the benefit of the defendants.

My attention has been called to *Sherwood* v. *Tucker* (1), which may be said to bear the other way. That case, however, may, it seems to me, be distinguishable. There was a tenancy agreement under which the landlord agreed to let and the tenant to take certain premises for three years from December 25, 1914, at a rent of 36*l.*, and it was agreed that "the said tenant shall have the right to purchase the said house and premises during the three years hereby provided for for the sum of 700*l.*" In 1917 during the tenancy the parties added and signed the following indorsement: "We the undersigned hereby agree that this lease be extended for three years expiring December 25, 1920," and in September, 1920, the parties added and signed a similar indorsement extending the lease for another three years. The question was whether the agreement giving the tenant the right to purchase "during the three years provided for" had been extended during the extended period of the tenancy; and Astbury J., after accepting the view that the option to purchase was a collateral provision outside the terms of the tenancy, came to the conclusion on the construction of the indorsements expressly extending the lease that in fact the parties had thereby agreed that there should be an extension of the lease as it stood with all its terms, collateral or otherwise, intact. And although he said he came to this conclusion with some hesitation, it was perhaps an inevitable one when once he held himself bound to read the original document as if the three years therein mentioned had been extended for two further terms of three years each. That case is therefore dependent on the precise language used, and does not seem to me to conflict with the conclusion to which I have come. I will declare that the defendants are not entitled to the benefit of the option to purchase.

Solicitors: *Sharpe, Pritchard & Co., for West & Son, Bridlington; Collyer-Bristow & Co., for Stuart & Smith, Hull.*

(1) Ante, p. 42.

H. C. G.

ASTBURY and LAWRENCE JJ.

1924
May 7.

In re PITCHFORD.

[12 of 1921.]

Bankruptcy—Proof—Provable Debt—Contingent Debt or Liability—Action for Debt—Stay of Action—Costs—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 30, *sub-s.* 3.

On October 25, 1920, the respondent, a mortgage broker (hereinafter called "the plaintiff"), issued a writ against the debtor in the King's Bench Division to recover a sum of 650*l.* for commission earned. On June 20, 1921, the action was set down for trial. On July 19, 1921, a receiving order was made against the debtor. On February 2, 1922, on the application of the plaintiff made in the action the action was stayed with liberty to the plaintiff to restore. On March 6, 1922, the plaintiff, instead of applying to restore the action, lodged his proof in the bankruptcy of the debtor for 650*l.* The official receiver rejected his proof, but on January 17, 1923, the county court judge reversed the decision of the official receiver and admitted the proof. On September 29, 1923, the plaintiff lodged a further proof for 46*l.* 17*s.* 9*d.* for his untaxed costs of the action, all of which were incurred before the date of the receiving order. On October 31, 1923, the official receiver rejected that proof. The plaintiff appealed, and on February 11, 1924, the county court judge reversed his decision and ordered that the proof of the costs, amounting to 46*l.* 17*s.* 9*d.*, should be admitted subject to taxation. On the appeal of the official receiver:—

Held, by Astbury and Lawrence JJ., that, as the plaintiff had obtained no judgment dealing either with his claim in the action or the costs thereof, but had elected to stay his action and to prove in bankruptcy for the amount claimed in the action, he was not entitled to prove for his untaxed costs of the action.

Held, also, by Astbury J., that the sum for which the plaintiff sought to prove in respect of his costs was not a debt or liability certain or contingent to which the debtor was subject at the date of the receiving order or to which he might become subject before his discharge by reason of any obligation incurred before that date, within the meaning of s. 30, sub-s. 3, of the Bankruptcy Act, 1914, and therefore was not provable.

Appeal from Shrewsbury County Court.

On October 25, 1920, the respondent, John Hunter Hall, a mortgage broker (hereinafter called "the plaintiff"), issued a writ in the King's Bench Division against the debtor to recover a sum of 650*l.*, which he claimed by way of commission earned for arranging a mortgage for the debtor. In March, 1921, the debtor delivered his defence, and on June 20, 1921, the action was set down for trial in Middlesex without a jury.

On July 19, 1921, a receiving order was made against the debtor.

On September 15, 1921, the plaintiff, through his solicitors, gave the official receiver notice of his claim.

On February 2, 1922, in consequence of the receiving order and upon the application of the plaintiff made in the action, an order was made staying the action and liberty was reserved to him to apply to restore the same, and on that occasion no application was made for any order as to costs or otherwise prior to the stay.

On March 6, 1922, the plaintiff, apparently thinking that he would do better in the bankruptcy than by applying to restore the action, lodged his proof in the bankruptcy for 650*l.* The official receiver rejected that proof, but on January 17, 1923, the county court judge reversed the decision of the official receiver and admitted the proof.

On September 29, 1923, the plaintiff lodged a further proof for 46*l.* 17*s.* 9*d.* in respect of his untaxed costs of the action in the King's Bench Division, all of which were incurred before the date of the receiving order. On October 31, 1923, the official receiver rejected that proof on the ground that the plaintiff had not, at the date of the receiving order, obtained any judgment for costs and was not in a position to enter up judgment therefor as of right. The plaintiff appealed from that decision; and on February 11, 1924, the county court judge reversed the decision of the official receiver and ordered that the proof for the costs, amounting to 46*l.* 17*s.* 9*d.*, should be admitted subject to taxation.

This was a motion by the official receiver that the order of the county court judge might be reversed and that his decision rejecting the proof for costs might be restored.

Hansell for the official receiver. The plaintiff here has obtained no judgment or verdict in his action for the commission he claimed and no order for payment of his costs of that action. Instead of prosecuting his action to judgment he elected to apply, as he was entitled to do, under s. 9, sub-s. 1, of the Bankruptcy Act, 1914, to the Court in which

ASTBURY and LAWRENCE JJ.

1924

PITCHFORD, *In re.*

his action was pending, and he obtained an order to stay with liberty to apply to restore, a liberty which he never availed himself of. A plaintiff, in general, does not find it worth while to prosecute an action to judgment after the defendant has become bankrupt, because he may fail to obtain any order for costs; and if he obtained one, he would only be able to prove and get a dividend. Having obtained no judgment in respect of his claim at the date of the receiving order the plaintiff has no provable debt to which costs can be said to be incident or appurtenant; and there is here no liability to pay the costs by reason of an obligation incurred by the bankrupt before the bankruptcy, because at the date of the receiving order the bankrupt was under no obligation to pay costs. Here there was at most a possible or contingent liability on the part of the bankrupt to pay costs, but such a contingency is certainly not a contingency in the sense of a contingent liability which gives rise to a provable debt, within the meaning of s. 30, sub-s. 3, of the Bankruptcy Act, 1914. But, even assuming that a contingent liability existed, that liability did not arise "by reason of any obligation incurred before the date of the receiving order," because there was at that time no judgment or order of any kind. When the plaintiff brought his action the bankrupt was not placed under any obligation to pay the costs; that obligation could only arise when judgment had been given against him. The reasoning of the judgments of the Court of Appeal in *In re A Debtor* (1) is applicable to the present case. There it was held that an order that the costs of a first trial should abide the event of a new trial was not an order for payment of costs by the bankrupt nor was it a judgment against the bankrupt at all.

Tindale Davis for the plaintiff. The plaintiff is entitled to prove for these costs. The costs are incident to the cause of action. The liability for costs arising by reason of a judgment in an action founded on contract is a liability to which the bankrupt is subject by reason of an obligation incurred previously to the receiving order, although untaxed

(1) [1911] 2 K. B. 652.

at that date, and is a provable liability: *Ex parte Peacock.* (1) The question is whether the debtor was subject to a contingent liability by reason of any obligation incurred before the receiving order. Where an obligation arising out of contract is incurred before the receiving order, as is the case here, the costs of an action are attached or appurtenant to the obligation or the action: *In re Newman.* (2) Assuming an obligation on the debtor before the date of the receiving order to pay the claim, it would be a great hardship if it were held that, notwithstanding a properly constituted action was pending, yet because the debtor goes bankrupt, he is not entitled to prove for the costs he has incurred in his action. The costs here were all incurred before the date of the receiving order; if the amount is disputed, the taxing Master can tax them.

[LAWRENCE J. How can the county court direct the taxation? This Court cannot direct taxation.]

The costs were a "contingent liability" within the meaning of s. 30, sub-s. 3, of the Bankruptcy Act, 1914, and are therefore provable.

[LAWRENCE J. The costs are not a liability at all; the plaintiff had only a chance or possibility: *Vint* v. *Hudspith.* (3)

ASTBURY J. In *In re British Gold Fields of West Africa* (4) the applicants there took out a summons in the winding up to proceed with their application and for liberty to prove for the amount sought to be recovered and for their costs. The plaintiff in the present case made no similar application.]

The plaintiff did what was in effect equivalent to what the shareholders did in that case, by proving in the bankruptcy. I rely upon *In re British Gold Fields of West Africa.* (4) Lindley M.R. there said: "If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be

(1) (1873) L. R. 8 Ch. 682.
(2) (1876) 3 Ch. D. 494.
(3) (1885) 30 Ch. D. 24.
(4) [1899] 2 Ch. 7, 11.

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provable if that is provable, but not otherwise." Before the date of the receiving order there was an obligation under contract; in respect of that obligation an action had been brought, which would have succeeded had it been heard out, and the costs of it were incurred before the date of the receiving order, which costs were appurtenant to the claim itself, and are provable, because the claim arose out of a breach of contract and has been admitted in the bankruptcy. In *In re Smith* (1) costs incurred in the arbitration proceedings held after the bankruptcy were held to be a provable debt. The case of *In re A Debtor* (2) is distinguishable, because the plaintiff there was ordered to pay the costs.

ASTBURY J. This is an appeal from an order of the county court judge sitting at Shrewsbury in which, reversing an order by the official receiver who had rejected the proof, he allowed the proof in question to be admitted. The matter perhaps in some ways is a curious one. [His Lordship then stated the facts and proceeded:] Now, it is to be observed that, however right Mr. Hall may have been in his action, he never got judgment for anything. The only order that was ever made in that action was an order staying proceedings with liberty to apply to restore, which Mr. Hall never availed himself of. The short point on which I think this appeal can be decided is that this is a demand to prove for a debt which, as a matter of fact, has no existence at all and never had any existence. It may very well be that, if an application had been made in the King's Bench action under certain circumstances an order for costs might have been obtained. But in fact no such application was made and no such order was ever pronounced.

Mr. Tindale Davis, who has said everything that can be said upon this point, contends that this small sum for costs, amounting to 46*l.* 17*s.* 9*d.*, was a contingent liability provable in the bankruptcy. Sub-s. 3 of s. 30 of the Act of 1914 says: "All debts and liabilities, present or future, certain or

(1) (1886) 3 Morrell, 179. (2) [1911] 2 K. B. 652.

contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy." In my judgment this is not a debt certain or contingent and was never incurred by reason of any obligation within the meaning of this section.

A number of authorities have been referred to, the two more relevant ones being *In re British Gold Fields of West Africa* (1) and *In re A Debtor.* (2) In the first of these cases certain shareholders in a company took out summonses under s. 35 of the Companies Act to have their names removed from the register on the ground of misrepresentation in the prospectus. There were a number of these applications, and two of them were heard first. In those two, orders were made for rectification with costs. After those orders were made the company was ordered to be wound up, and shortly afterwards the other applicants took out the usual summonses in the winding up for leave to proceed with their applications or for liberty to prove for the amounts sought to be recovered and for their costs. Their right to be removed from the register and to prove for the amounts paid up on their shares was not contested, and an order for rectification was made accordingly ; but in some way which I do not quite understand, no order was made in respect of the costs of those summonses owing to some objection by the official receiver, who was also the liquidator of the company. The matter then came before Wright J. sitting as the company judge having jurisdiction in the matter, and he made an order that those applicants were entitled to add their taxed costs to their debts and to prove for the same in the winding up. An appeal was brought against that decision on the ground (amongst others) that in the absence of an order for payment of costs the company was under no "liability" for costs at the date of the receiving order, and the costs were consequently not provable. The judgment of the Court of Appeal seems to me to be perfectly plain

(1) [1899] 2 Ch. 7, 11, 12. (2) [1911] 2 K. B. 652.

ASTBURY and LAWRENCE JJ. 1924 PITCHFORD, *In re.*

on the point. Lindley M.R., who gave judgment, dealt with the case of an action being brought against a man who becomes bankrupt and also with the case of an action being brought by a man who himself becomes bankrupt subsequently. With regard to the first he says this: "If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise." I read that as meaning the costs which the successful litigant has obtained an order for. Then he says on the other hand: "If, therefore, what is recovered is unliquidated damages 'arising otherwise than by reason of a contract, promise, or breach of trust,' that sum is not recoverable unless judgment, or at least a verdict for it, has been obtained before adjudication, or now the receiving order." In the first case it is apparently of no consequence if the order is obtained under liberty to continue the action, after the receiving order, whereas in the second case that procedure is not available. Then he says: "An application under s. 35 of the Companies Act, 1862, to rectify the register and for a return of money paid is not a claim for unliquidated damages." In other words, he treated the case as coming within the first heading he mentioned. "It is," he said, "a claim for two things, namely, first, for the removal of an impediment which prevents the demand for a return of the money from being successful; and, secondly, it is a demand for the repayment of a liquidated sum, and not for unliquidated damages. The register having been rectified, the sums paid by the applicants are clearly provable debts, and the costs of rectifying the register"—which he treats as having been properly ordered by Wright J. to be paid—"are costs of obtaining an order without which these debts cannot be recovered or admitted to proof." With regard to *In re A Debtor* (1) the short point there was whether a man should be allowed to prove in respect of costs for which no order had been obtained before the date of

(1) [1911] 2 K. B. 652, 655, 657

the bankruptcy. The headnote is as follows: "An order for a new trial provided that the costs of the first trial should abide the event of the new trial. The plaintiff in the action subsequently became bankrupt, but the bankruptcy was annulled before the new trial took place. The new trial resulted in favour of the defendant, and the plaintiff was ordered to pay the costs of the first trial, which had been taxed, and the costs of the second trial to be taxed. The defendant served on the plaintiff a bankruptcy notice in respect of the costs of the first trial. The plaintiff impeached the validity of the bankruptcy notice on the ground that it related to a debt provable in the late bankruptcy"; and it was held that, "at the date of the bankruptcy the plaintiff was not subject to a contingent liability to pay costs by reason of any obligation incurred before the date of the bankruptcy within s. 37 of the Bankruptcy Act, 1883, and that the objection to the bankruptcy notice failed." Now, the present case is very much stronger than that, because in that case, although it is true that there had been no order to pay the costs of the first trial, at the date of the bankruptcy there had been an order that there should be a new trial and that the costs of the first trial should be dealt with in the second. Yet, the Court of Appeal held that that was not sufficient. Cozens-Hardy M.R. said: "I ask myself, at the date of the bankruptcy what order was there that the bankrupt should pay these costs? I find none." Then a little lower down he says: "There is no order against either party in such a form as that he shall pay the costs"; and then he comes to the conclusion that the case fell precisely within the observations of the Court of Appeal in the case of *In re British Gold Fields of West Africa.* (1) Buckley L.J. in that case said that he was willing to assume that the costs of the first action at the date of the bankruptcy were a contingent liability. Then he refers to s. 37, sub-s. 3, and says: "The question then is whether the debtor was subject to a contingent liability 'by reason of any obligation incurred before the date of the receiving order.' I am

(1) [1899] 2 Ch. 7.

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unable to find here that the debtor was under any obligation at the date of the prior bankruptcy. I agree with what was said by Cave J. in *In re Bluck* (1): 'If a man brings an action he does not place on himself an obligation to pay the costs; that obligation arises when judgment is given against him.' An obligation may arise in any one of various ways. It may arise by contract. It will arise if a judge makes an order against him. But in the latter case, until judgment there is no obligation." Then a little lower down he says: "There is no order to pay costs. There is an order that it shall be remitted to a tribunal subsequently to determine whether the costs shall or shall not be paid. That is not an obligation. There was here no binding obligation which could give rise to a provable debt."

The present case is far stronger than that. Here there was no order of any sort or kind dealing either with the claim or with the costs of the action, and the creditor having chosen, as the respondent in the present case has chosen, to obtain an order staying his action relying on proof in the bankruptcy, it seems to me perfectly hopeless to contend that he is now at liberty to go to the county court, which had no jurisdiction of any sort or kind, to make an order for the costs of the King's Bench action, and ask that he should be allowed to prove for a sum of costs in respect of which he has obtained no judgment and in respect of which there, consequently, can be no taxation. I think this appeal should be allowed.

LAWRENCE J. I concur. The learned county court judge has decided that the respondent is entitled to prove for the costs in question on the ground that they were a contingent liability to which the debtor was subject at the date of the receiving order by reason of an obligation incurred before that date, the foundation of his decision, as I understand it, being, that the action, in respect of which the costs were incurred, was an action brought on a contract made by the debtor before the date of the receiving order and that the costs were incident to the cause of action and ought

(1) (1887) 57 L. T. 419, 420.

therefore to be added to the sum for which the respondent was ultimately allowed to prove.

Speaking for myself, I do not propose to determine whether, generally speaking, costs of an action on a contract are a contingent liability within the meaning of s. 30, sub-s. 3, or are only a possible liability not giving rise to any provable debt; nor do I propose to express an opinion on the question whether, if the respondent had prosecuted his action after the date of the receiving order and had then obtained an order for the payment of his costs, he could have proved for those costs in the present bankruptcy. In my judgment this case falls to be determined on the particular facts and on the course which the respondent himself has chosen to adopt, a course which, in my opinion, precludes him from now seeking to prove for these costs. He voluntarily applied to the Court in which his action was pending for the stay of that action without asking for or obtaining any order for the payment or taxation of his costs. He then lodged a proof in the bankruptcy for the amount of his claim, which was ultimately admitted. By adopting this course, he seems to me to have deliberately abandoned any claim to the costs of the action. The county court, admittedly, has no jurisdiction to make an order for the payment or for the taxation of these costs. The costs were entirely in the discretion of the High Court, and neither the official receiver nor the county court can determine whether the High Court would have awarded costs to the respondent had he asked for them. Moreover, the High Court could hardly have made an order for the payment of the costs of the action without first hearing the action, a proceeding which the respondent for divers reasons desired to avoid. In these circumstances I find a difficulty in seeing how the respondent can possibly be admitted to prove in the bankruptcy for these costs. Mr. Tindale Davis relied upon the case of *In re British Gold Fields of West Africa* (1), and more especially on the following general proposition there laid down by the Master of the Rolls: "If an action is brought against

(1) [1899] 2 Ch. 7, 11.

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a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise." When the learned judge there speaks of the action being successful, I think he must mean that judgment is pronounced in the action in favour of the plaintiff for the sum claimed and for the costs of the action. This proposition has, in my opinion, no application to the facts of the present case, as the action has never been tried and no judgment has ever been pronounced in it, therefore it cannot be said that it has been successful. Moreover the actual decision in *In re British Gold Fields of West Africa* (1) has no application at all to the present case. What was decided there was that the applicants ought to be allowed to prove for the costs incurred by them in obtaining an order in the winding up for the rectification of the register of the company, as, without such an order, their proofs could not have been admitted; consequently the costs were necessarily incurred in removing an impediment to the admission of their proofs. No difficulty arose in that case either in determining the right to costs or in ascertaining the amount of the costs, as both the application for rectification and the application to be admitted to proof were made in the winding up and the same Court had full jurisdiction to deal with the whole matter.

As regards the case of *In re A Debtor* (2), upon which Mr. Hansell relied, Mr. Tindale Davis rightly pointed out that it dealt with the costs of an unsuccessful plaintiff, which distinguishes it from the present, but in the following passage of the judgment of Buckley L.J. that learned judge states quite generally that the obligation under the section may arise in one of various ways: "It may arise by contract. It will arise if a judge makes an order against him. But in the latter case until judgment there is no obligation." I have only referred to that statement, as in my opinion it tends to support the view that, unless and until an order for payment of costs is made, there can be no liability giving rise to a

(1) [1899] 2 Ch. 7. (2) [1911] 2 K. B. 652, 657.

provable debt. However, as already stated, it is enough for the purpose of a decision in this case that the respondent has adopted a course which precludes him from asking to be admitted as a creditor in respect of these costs, and I concur in thinking that the appeal ought to be allowed.

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Solicitors: *Solicitor to the Board of Trade; Haslam & Sanders.*

H. C. H.

In re BAKER.

BAKER *v.* PUBLIC TRUSTEE.

RUSSELL J.
1924
May 6.

[1924. B. 1088.]

Tenant for Life and Remainderman—Trust for Conversion—Discretionary Power of Postponement—Reversionary Interest—Postponement of Conversion—Capital and Income—Apportionment as between Tenant for Life and Remainderman—Rate of Interest.

In applying the rule in *In re Earl of Chesterfield's Trusts* (1883) 24 Ch. D. 643, as to the apportionment between capital and income of the amount of an unconverted reversionary interest which has fallen in, interest at 4 per cent. ought now to be adopted as the basis of calculation.

ORIGINATING SUMMONS.

By his will the testator devised the residue of his real and personal estate to trustees, upon trust for sale and conversion with power of postponement, and directed them to invest the proceeds and pay the income to his wife for life, and, after her death, to stand possessed of the investments upon the trusts declared in his will. There was no clause in the will disposing of the income before sale. Testator at his death on July 29, 1917, was entitled to a reversionary interest in the residuary estate of his father, expectant on the death of his mother. The reversionary interest, which produced no income, was retained by the trustees unconverted until the death of the testator's mother on October 21, 1922. The testator's widow died on February 8, 1923, having by her will appointed the Public Trustee sole executor.

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When the reversionary interest fell in it was worth nearly 5000*l.* The Public Trustee now claimed that the estate of the testator's widow was entitled to an allowance for income in respect of the reversion, calculated on its value at falling in, under the rule in *In re Earl of Chesterfield's Trusts* (1), and that the rate of interest in such calculation should be 4 per cent. The residuary legatees, while admitting that the rule applied, contended that the rate of interest should not exceed 3 per cent.

H. T. Methold for the trustees of the will.

W. H. Gover for the Public Trustee. In apportioning between capital and income the amount of the unconverted residuary interest which has now fallen in, interest at 4 per cent. ought now to be adopted as the basis of calculation, as in the case of *In re Earl of Chesterfield's Trusts.* (1) In fixing the rate of interest the Court should have regard to the rate obtainable on trustee securities at the time : *In re Goodenough, Marland* v. *Williams* (2) ; *Rowlls* v. *Bebb* (3) ; *Liverpool Corporation* v. *Peter Walker & Son, Ld.* (4) ; *In re Hollebone, Hollebone* v. *Hollebone* (5) ; *In re Beech, Saint* v. *Beech.* (6)

In the existing monetary conditions it is submitted that the Court should revert to the old rate and fix 4 per cent. instead of 3 as the basis of calculation.

Courthope Wilson K.C. and *H. W. Clements* for the residuary legatees. In the case of a reversionary interest producing no income the rate has been fixed at 3 per cent. : *Rowlls* v. *Bebb.* (3) There is a distinction between unauthorized income-producing investments directed by will to be converted, but retained unconverted for the benefit of the estate, and cases where the investment is a reversion producing no income. In the former case it has been the practice of the Court to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value, but in the latter case " it may well be that the Court would think 3 per cent.

(1) 24 Ch. D. 643.
(2) [1895] 2 Ch. 537.
(3) [1900] 2 Ch. 107.
(4) [1908] 2 K. B. 33, 50.
(5) [1919] 2 Ch. 93.
(6) [1920] 1 Ch. 40, 42.

on the value of the reversion an adequate allowance to the life tenant" : *In re Beech, Saint* v. *Beech.* (1) In this case the reversion produced no income, and it is submitted that 3 per cent. should be the basis of calculation for the purpose of apportionment between the estate of the tenant for life and the remaindermen.

RUSSELL J. It is conceded that in this case the rule in *In re Earl of Chesterfield's Trusts* (2) applies.

That was a case where the testator bequeathed his residuary personal estate to trustees, on trust for conversion but with a power of postponement, and directed them to hold the proceeds on trust for A. for life with remainders over. The residue included outstanding personal estate, the conversion of which the trustees postponed, which eventually fell in some years after the testator's death. The Court held that for the purpose of adjusting the respective rights of the tenant for life and remaindermen the outstanding personal estate, on falling in, ought to be apportioned between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, produce at the date of receipt the amount actually received ; the sum so ascertained to be treated as capital, and the residue as income.

In *In re Goodenough, Marland* v. *Williams* (3) Kekewich J. had decided that, in future, in applying the rule as to the apportionment, as between capital and income, of the amount of an unconverted reversionary interest which had fallen in, interest at 3, instead of at 4, per cent. ought to be adopted as the basis of the calculation. The learned judge said : " What I have to face is the fact that 4 per cent. has for generations been regarded as the proper rate of interest to be charged or allowed in the Chancery Division unless 5 per cent. is taken for special reasons. . . . . But we all know

(1) [1920] 1 Ch. 40, 44. (2) 24 Ch. D. 643.
(3) [1895] 2 Ch. 537, 539.

RUSSELL J. 1924 BAKER, *In re.* BAKER *v.* PUBLIC TRUSTEE.

that at the present day not only are trustees unable to obtain 4 per cent. upon an investment of trust securities, but ordinary investors, who are able and willing to go outside trust securities, but yet are determined not to be speculative, find it impossible to get more than 3 per cent., and are glad to get it with safety. . . . . It does seem to me that it would be bordering on an absurdity for judges of the Chancery Division to say that interest is to be calculated at 4 per cent. when not only trustees, but ordinary prudent investors determined not to speculate, cannot obtain 3 per cent." It is obviously to the advantage of the person entitled to the capital that the interest should be as low as possible, and it is contended by the residuary legatees, on the authority of *Rowlls* v. *Bebb* (1), that the said rule has been permanently altered so that the rate is no longer 4 per cent. but is and remains 3 per cent. In that case the rule in *In re Earl of Chesterfield's Trusts* (2) was held to apply, and the question arose as to the rate of interest. Lindley M.R. said (3) : " The only other question is, whether interest should be calculated at 3 per cent. or at 4 per cent. I have not looked at the Judgment Act, but I think I am right in saying that it provides that a judgment debt shall bear interest at 4 per cent. Of course, we cannot alter that. And I think the Rules provide that legacies shall bear interest at 4 per cent. But I know of no rule which applies in terms to such a case as this, or even to the making good of breaches of trust." Then follow these words, which show the basis of the decision : " Having regard to the rate of interest which can now be obtained on securities upon which trustees may invest, it appears to me that in a case of this kind, even apart from the view taken by Kekewich J. in *In re Goodenough* (4), that 3 per cent., not 4, ought to be the rate of interest."

Since then the rate of 3 per cent. has been adhered to and the question is whether in this case I ought to revert to the old rate of 4 per cent. In my opinion I ought to do so.

(1) [1900] 2 Ch. 107.
(2) 24 Ch. D. 643.
(3) [1900] 2 Ch. 107, 117.
(4) [1895] 2 Ch. 537.

To adapt the words of Lindley M.R., it appears to me, having regard to the rate of interest which can now be obtained on trust securities, that 4 per cent., and not 3, ought to be the rate of interest, because you have to ascertain what sum invested in trustee securities on July 29, 1917, would produce the 5000*l.* by October 21, 1922. The fact is that during those five years trustee securities would bring in much more than 3 per cent., and therefore the reason given by Kekewich J. for only allowing that rate no longer applies.

It was said that there was no case in which the rate of 3 per cent. had been departed from in the case of a reversionary interest producing no income.

But in the converse case where part of the residuary estate, held upon trust for conversion with a discretionary power of postponement, consisted of an investment on an unauthorized security bearing a high rate of interest, the Court has been in the habit of allowing the tenant for life a percentage on the capital value, ascertained at the testator's death, of the unauthorized investment, and that percentage in *In re Beech, Saint* v. *Beech* (1) was fixed at 4 per cent., instead of at 3, which had been the rule, in view of the prevailing financial position. If, on account of the existing monetary conditions, you may revert to the old rule and hold that, as between tenant for life and remainderman, the tenant for life is entitled to 4 per cent. on the value of unauthorized income-producing securities, I can see no reason why you should not also do so in the calculations necessary under the rule in *In re Earl of Chesterfield's Trusts* (2) in the case of a reversionary interest producing no income. Accordingly I declare that the value of the reversion at the date of falling in must be apportioned between capital and income according to the rule in the *Chesterfield Case* (2), the interest to be at the rate of 4 per cent.

Solicitors: *Lyne & Holman; Whittington, Son & Barham.*

(1) [1920] 1 Ch. 40.

(2) 24 Ch. D. 643.

J. B. B. M.

TOMLIN J.

1924

May 6, 7.

In re HAMMOND.

PARRY *v.* HAMMOND.

[1924. H. 531.]

Will—Construction—Gift of Personalty "equally between" Two Daughters and "their respective issue"—Issue competing with Parents—Real Estate—Gift to Son for Life and afterwards to his Children—Estate in Tail—Rule in Shelley's Case.

A testator bequeathed the entire income of his estate to his wife during her lifetime, and after her decease he devised a freehold farm to his son "during his lifetime and afterwards to his children, if any. Should my son leave no issue, then the farm shall return to my two daughters, E. M. P. and O. M. H., and to their issue afterwards":—

Held, that there was imported into the gift to the son a gift to the heritable blood generally, and that, therefore, the rule in *Shelley's Case* (1581) 1 Rep. 93*b* applied, and that the son took an estate tail, subject to the life interest of the testator's widow.

The testator gave all his residuary personal estate, subject to the life interest of his wife, equally between his two daughters, E. M. P. and O. M. H., and their respective issue:—

Held, that "issue" was not a word of limitation, but the issue took as purchasers, and, therefore, the residuary personal estate went in moieties, one moiety to each of the daughters and her issue, and all the issue who came into existence before the period of distribution—namely, the death of the tenant for life—would take in competition with their mother.

THE testator by his will, dated April 24, 1923, gave his wife certain specific bequests, and he also bequeathed to her the entire income of the remainder of his estate during her lifetime, and after her decease he bequeathed his freehold farm, Coedybrain, to his son, Wyndham James Hammond, "during his lifetime and afterwards to his children, if any. Should my son leave no issue, then the farm shall return to my two daughters, Eurina Mary Parry and Olive Martha Hammond, and to their issue afterwards. . . . . All other of my possessions I leave equally between my two daughters, Eurina Mary Parry and Olive Martha Hammond, and their respective issue." He appointed the plaintiff, E. M. Parry, and the defendants, W. J. Hammond and O. M. Hammond, to be the executors of his will. The testator died on

August 16, 1923. Except for the farm, Coedybrain, his estate consisted entirely of personalty. This summons asked whether the testator's residuary personal estate was vested (subject to the life estate of his widow) in his two daughters absolutely or how otherwise. It also raised the question what estate or interest W. J. Hammond took in the freehold farm Coedybrain.

Waddilove for the plaintiff. With regard to the question of what estate the daughters take in the residuary personal estate of the testator there was a divergency of opinion in the text-books. In Jarman on Wills, 6th ed., p. 1193, the rule was laid down that where personal estate was bequeathed in language which, if applied to real estate, would create an estate tail, it vested absolutely in the person who would be the immediate donee in tail, and consequently devolved at his death to his personal representative, and not to his heir in tail. That rule found support in Theobald's Law of Wills, 7th ed., p. 478, but a contrary view was taken in Hawkins on the Construction of Wills, p. 197. He cited *Donn* v. *Penny* (1); *Gibbs* v. *Tait* (2); *Harvey* v. *Towell* (3); *Samuel* v. *Samuel* (4); *Prentice* v. *Brooke* (5); *Parkin* v. *Knight* (6); and *Tate* v. *Clarke*. (7)

Shufeldt for Olive Hammond. The daughters of the testator take an absolute interest in the residuary personal estate. In Jarman on Wills, 6th ed., p. 1198, the proposition is laid down that a simple bequest to A. and his issue, which, if the subject of disposition were real estate, would indisputably make A. tenant in tail, confers on him the absolute ownership in personalty. In *Lyon* v. *Mitchell* (8), where the gift was very similar to that in the present case, it was held that the gift passed an absolute interest to the sons. It is an absolute gift to the daughters with a substitutionary gift to their issue if the daughters should not survive the testator.

(1) (1815) 1 Mer. 20.
(2) (1836) 8 Sim. 132.
(3) (1847) 7 Hare, 231.
(4) (1845) 9 Jur. 222.
(5) (1880) 5 L. R. Ir. 435.
(6) (1846) 15 Sim. 83.
(7) (1838) 1 Beav. 100.
(8) (1816) 1 Madd. 467.

TOMLIN J. 1924 HAMMOND, *In re.* PARRY *v.* HAMMOND.

In *In re Coulden* (1) the gift was held to give an absolute interest to the children living at the death of the testator, and to the issue of the children then dead, the issue of the children then living not to compete with their parents. In Jarman on Wills, p. 1331, this is commented on as a bold decision, but that is no reason why it is not an authority. In *In re Parkinson's Trust* (2) a similar bequest was held to be a gift to two distinct classes—namely, to each of the donees and their respective issue.

With regard to the devise of the freehold farm to the testator's son and his children, it is stated in Hawkins on Wills, p. 243, that "children" is not a word of limitation, although it may be used as such if the intention appears.

He cited *In re Jones.* (3)

Baden Fuller for two infant children of the plaintiff. The gift of the residuary personal estate is a gift in settlement. The testator when he uses the word "issue" means "children." It follows that it is a gift to a class, the two daughters and their children. Such a gift may be either stirpical or per capita. This gift is per capita throughout.

With regard to the devise of the freehold farm, the rule in *Maitland* v. *Chalie* (4), that in a gift over without leaving children the word "leaving" should be read "having," applies to this case.

W. G. Hart for the testator's son. The effect of the whole devise of the freehold farm is to give the testator's son an estate in fee tail. The gift over must make it a gift to all the issue, and not to the children only. In Theobald's Law of Wills, 7th ed., p. 413, it is stated that the words "son" and "child" may be used as words of limitation, but if they are used with a view to the whole class, then it must be taken to be the manifest intention of the testator to give an estate tail. The Court will construe such a gift as giving an estate in tail male where it is necessary to do so in order to effectuate the manifest general intent of the testator: *Robinson* v.

(1) [1908] 1 Ch. 320.
(2) (1851) 1 Sim. (N. S.) 242.
(3) [1910] 1 Ch. 167.
(4) (1822) 6 Madd. 243.

Robinson. (1) The whole of the will must be looked at for the purpose of seeing what is the general intent: *Bowen* v. *Lewis.* (2) Where there are the words "die without issue" or words of similar import, the word "children" must be treated as meaning all the issue, and an estate tail is by necessary implication deemed to be given to the person whose issue are to take: *Andrew* v. *Andrew.* (3) On the authorities the gift over would give the daughters an estate tail. It is impossible, therefore, for the Court to hold that the testator meant to give the son a life interest only. It is clear that the son takes an estate tail in accordance with the rule in *Shelley's Case* (4); *In re Buckton.* (5)

TOMLIN J. I have to determine two questions upon this short will.

The first question is, as to the effect of a gift of a freehold farm expressed in the following terms: "To my son Wyndham James Hammond during his lifetime, and afterwards to his children, if any. Should my son leave no issue, then the farm shall return to my two daughters" (naming them) "and to their issue afterwards." I have to come to a conclusion as to the construction of the language, and if, upon the construction of the language, I conclude that there is imported into it a gift to the heritable blood generally, then I am bound to apply the rule in *Shelley's Case* (4), and that would operate to give Wyndham James Hammond an estate in tail, notwithstanding that the gift is in terms to him during his life. When a will presents difficulties of this kind, it seems to me prudent to depart as little as possible from the primary meaning of the several words used, and if, by following that course, there results by the application of some rule of law a consequence which will give effect to what the testator's general intention appears to be adherence to the primary meaning is justified. Bearing that in mind, I think it is my duty to construe these words as meaning what they

(1) (1751) 3 Atk. 736.
(2) (1884) 9 App. Cas. 890.
(3) (1875) 1 Ch. D. 410.
(4) 1 Rep. 93*b*.
(5) [1907] 2 Ch. 406.

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say, that is, " children " means children, and " issue " means descendants generally, and on this footing it is plain that what the testator was contemplating was his son and his son's children and his son's children's children succeeding one after the other to the property, and that when he says " should my son leave no issue " he means that if there shall at any time be a failure of the issue of his son in the wide sense then the property is to go over. In other words he is contemplating the descent of the estate through the heritable blood generally. If I come to that conclusion, as I do, it seems to me that I am bound to apply the rule in *Shelley's Case* (1), and having applied the rule in *Shelley's Case* (1) the result is that the son takes an estate tail, and taking an estate tail effect is given in the best possible way to the intention of the testator that the estate should descend through the heritable blood. My conclusion on the first question is that the son takes an estate tail.

With regard to the residue I am embarrassed by the statements in text-books, to which I have had my attention called, and which show a diversity of view, and I am embarrassed also by reference to the authorities cited in support of those statements, which when examined do not seem to me to perform the function for which they were cited. The result is that I am left more or less to the light of nature to determine what the meaning of these words may be. I think, however, that with reference to a gift of personalty to persons and their respective issue the law is correctly stated by Parker J. in *In re Coulden* (2), where he says: " In gifts of real estate the word ' issue,' in a gift to A. and his issue, is, according to the decisions, prima facie a word of limitation creating an estate tail. The reason is that an estate tail in the ancestor is the only way of providing for all the issue of the ancestor, and the Courts have assumed that in a devise to one and his issue the whole line of issue is intended. There is no similar reason for holding that ' issue ' is prima facie a word of limitation in gifts of personal property. On the contrary, to hold ' issue ' in such a case

(1) 1 Rep. 93*b*. (2) [1908] 1 Ch. 320, 324.

to be a word of limitation would, by conferring an absolute interest on the ancestor, deprive the issue of all benefit under the will. Therefore I do not think that there is any rule of construction compelling me to hold that in gifts of personalty 'issue' is prima facie a word of limitation. That the word 'issue' may in gifts of personal property be a word of limitation no one doubts, but, in my judgment, whether it be so or not is purely a question of construction on each particular instrument, the Court which has to interpret such instrument being unfettered by any general rule. Indeed, by a gift of personalty to A. and his issue, it seems to me more likely that a testator means the issue to take jointly with or by substitution for A. than that A. should take to the exclusion of his issue, and where there are words of division, such as a gift to divide between A. and his issue, it is, in my judgment, almost conclusive that the word 'issue' cannot be used as a word of limitation."

Treating myself, therefore, as unbound by any rule, I am in the happy position of being able to give effect to what I believe to be the meaning of the words. In this case I think that "issue" is not a word of limitation, but the issue take as purchasers, that, having regard to the words "equally between" and the words "their respective issue" there is intended to be a stirpital division, that the residue therefore goes in moieties, one moiety to each of the daughters and her issue, and that in regard to each daughter and her issue, all of the issue who came into existence before the period of distribution—namely, the death of the tenant for life—will take in competition with their mother.

There may, however, be a question whether, as between a daughter and her issue, they take as tenants in common or as joint tenants. That question has not been argued, and is not proper to be determined at the present time. It may be left, and may properly be left, for determination at the cessation of the life interest, when there may be in existence those who will be interested in arguing one way or the other. The declaration will be on the lines of the conclusion at which I have arrived, but the declaration will be expressed as being

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without prejudice to the question whether in relation to any moiety the daughter and her issue take as joint tenants or as tenants in equal shares.

Solicitors : *Gibson & Weldon, for T. Price Thomas, Ystrad-Mynach, Glamorgan.*

P. J. B.

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[1922. D. 1520.]

War—Austrian National—Charge on Property—Administrator not satisfied that Nationality of Allied and Associated Power ipso facto acquired—Action for Declaration that Acquisition of Nationality shown—Jurisdiction—Treaty of Peace (Austria), arts. 70, 249 (*b*)—*Treaties of Peace (Austria and Bulgaria) Act,* 1920 (10 *Geo.* 5, *c.* 6), *s.* 1—*Treaty of Peace (Austria) Order,* 1920, *arts.* 1 (*ix.*), 2.

By art. 249 (*b*) of the Treaty of Peace with Austria the Allied and Associated Powers reserved the right to retain and liquidate all property, rights and interests which belonged at the date of the coming into force of the Treaty to nationals of the former Austrian Empire, but it was provided that "Persons who within six months of the coming into force of the present Treaty show that they have acquired ipso facto in accordance with its provisions the nationality of an Allied or Associated Power . . . . will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph." The annex to arts. 249 and 250 sanctioned the imposition of a charge on such property, rights or interests. Arts. 248 to 262 with their annexes were scheduled to the Treaty of Peace (Austria) Order, 1920, and by art. 1 (i.), of the Order given full effect as law. By art. 1 (ix.), the charge was imposed on all property, rights and interests within His Majesty's Dominions belonging to nationals of the former Austrian Empire at the date when the Treaty came into force. Art. 2 provided that: "For the purposes of the foregoing provisions of this Order but not including the Schedule therein referred to . . . . the expression, 'nationals of the former Austrian Empire,' does not include persons who within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired ipso facto in accordance with its provisions nationality of an Allied or Associated Power":—

Held (by Tomlin J. and the Court of Appeal) that, where the Administrator had decided that he was not satisfied that the plaintiff, who was originally a national of the former Austrian Empire, had acquired ipso facto the nationality of an Allied or Associated Power, the Court would not, in an action by him for a declaration that he

has "shown that he has acquired ipso facto in accordance with the provisions of the said Treaty the nationality of the Republic of Poland and that he is not a national of the former Austrian Empire within the meaning of the said Treaty and the said Treaty of Peace Order and that his property, rights and interests in His Majesty's Dominions are not subject to be charged under the said Treaty and the said Treaty of Peace Order," go behind the decision of the Administrator and investigate independently the question of nationality.

POINT OF LAW.

The plaintiff was born at Vienna in 1877; his father was born in Galicia, which became part of the Polish Republic, as the result of the Treaty of St. Germain-en-Laye. This Treaty came into force on July 16, 1920. The question then arose whether the plaintiff's property in the United Kingdom thereupon became subject to the charge imposed on the property, rights and interests of nationals of the former Austrian Empire under the Treaty of Peace (Austria) Order, 1920, art. 1 (ix.), in pursuance of art. 249 (*b*) and the annex to arts. 249 and 250 of the Treaty.

The plaintiff claimed (inter alia) that he was within the provision contained in art. 249 (*b*) of the Treaty in favour of "persons who within six months of the coming into force of the present Treaty show that they have acquired ipso facto in accordance with its provisions the nationality of an Allied or Associated Power." Art. 2 of the Treaty of Peace (Austria) Order, 1920, provides that "for the purposes of the foregoing provisions of this Order . . . . the expression 'nationals of the former Austrian Empire' does not include persons who within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired ipso facto in accordance with its provisions nationality of an Allied or Associated Power."

The plaintiff accordingly submitted to the Administrator of Austrian Property documents to show that he had ipso facto in accordance with the provisions of the Treaty acquired Polish nationality, and the Administrator extended the time for showing this beyond the six months specified in the Order. By a letter dated November 11, 1921, the Administrator intimated that he was not satisfied on the evidence before

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him and required the plaintiff to present himself to be examined pursuant to art. 1 (x.) (*g*), of the Order. The plaintiff submitted himself to this examination, but ultimately the Administrator determined that he was not satisfied that the plaintiff had ipso facto in accordance with the provisions of the Treaty acquired a Polish nationality.

The plaintiff then commenced an action against the Administrator claiming two alternative declarations, of which the second was alone material for the purposes of this preliminary point. It was " a declaration that he has shown that he has acquired ipso facto in accordance with the provisions of the said Treaty the nationality of the Republic of Poland and that he is not a national of the former Austrian Empire within the meaning of the said Treaty and the said Treaty of Peace Order and that his property, rights and interests in His Majesty's Dominions are not subject to be charged under the said Treaty and the said Treaty of Peace Order."

By an order made by the Master in chambers on November 7, 1923, upon the application of the plaintiff after defence had been delivered it was ordered " that there be tried before this Court as a preliminary point the question whether in view of the fact (which is admitted by the plaintiff for the purpose only of raising this point) that the defendant is not satisfied that the plaintiff had in the manner set forth in art. 2 of the Treaty of Peace (Austria) Orders, 1920 and 1921, acquired or obtained nationality other than Austrian the plaintiff is entitled to claim that his property, rights and interest are not subject to be charged under the Treaty of St. Germain-en-Laye and the said Treaty of Peace Orders." The matter came before the Court upon the preliminary question upon December 19, 1923, but after some argument the matter was adjourned to enable the parties to reconsider the form of the preliminary question, and it was by agreement amended and as amended was as follows: " Whether the decision of the Administrator that he is not satisfied that the plaintiff has in the manner set forth in art. 2 of the Treaty of Peace (Austria) Orders,

1920/1921, acquired nationality other than Austrian is final and conclusive so that it cannot be questioned by way of an action for a declaration."

The relevant portions of the Treaty, Treaties of Peace (Austria and Bulgaria) Act, 1920, and the Treaty of Peace (Austria) Order, 1920, are set out in the judgment.

Sir T. W. H. Inskip K.C. and *Roland Burrows* for the Administrator. The plaintiff claims a declaration that he is not a national of the former Austrian Empire, but acquired ipso facto Polish nationality. Before the Administrator various documents were submitted, but in view of the decision in *Rothschild* v. *Administrator of Austrian Property* (1), as to the inadmissibility of such documents, great expense would be involved if the case went to trial, which would be wasted if the Court held that it was for the Administrator to be satisfied that the plaintiff has acquired ipso facto a Polish nationality. It is for this reason that a decision on the preliminary point of law is desired. For the Administrator it is contended that he is the person to be satisfied under the Treaty of Peace (Austria) Order, art. 2, and that, as he has decided after due investigation that he is not satisfied, it would be useless for the Court to consider the question of nationality, seeing that no decision of the Court would exempt the plaintiff's property from the Treaty of Peace charge. The matter is controlled by art. 2 of the Order, and it adds the words "to the satisfaction of the Administrator," which naturally did not and could not appear in art. 249 (*b*) of the Treaty. There it was left unsettled to whom the acquisition of nationality was to be shown. But it is the Order which makes this part of the Treaty a portion of the municipal law of this country; and the words of art. 2 of the Order being plain, the Court must give effect to them, even although they enlarge or cut down rights given by the Treaty. The charge is imposed by the Order and not the Treaty, and under the Order it is for the Administrator and not this Court to determine the question of nationality.

(1) [1923] 2 Ch. 542.

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Schiller K.C. and *August Cohn* for the plaintiff. It is not left to the sole discretion of the Administrator to decide whether a national of the former Austrian Empire has ipso facto acquired in accordance with the provisions of the Treaty nationality of an Allied or Associated Power so as to defeat the charge imposed on the property of Austrian nationals in this country. The rights of the plaintiff are determined by art. 249 (*b*) of the Treaty, which does not say to whom the plaintiff has to show that he has ipso facto acquired the nationality of an Allied or Associated Power. This article is made part of the municipal law of this country by the Treaty of Peace (Austria) Order, 1920, art. 1. The Court therefore has jurisdiction to declare that the plaintiff has shown that he has acquired Polish nationality. It is true that art. 2 of the Treaty of Peace (Austria) Order, 1920, contemplates this being shown "to the satisfaction of the Administrator"; but this only means that the Administrator is the person to whom the requisite evidence must first be adduced. In any case it cannot cut down art. 249 (*b*) of the Treaty.

[TOMLIN J. Under the Treaty it had to be shown within six months that a new nationality had ipso facto been acquired.]

In fact evidence was adduced to the Administrator within six months of the ratification of the Treaty, but he could not deal with it so soon and extended the time for considering the matter.

[TOMLIN J. He might be able to do that as regards your rights under the Order, but that would not affect the rights under the Treaty.]

Under the Order it is for the Administrator to be satisfied in the first instance; but if he ought to be satisfied on the evidence adduced, proceedings will lie by mandamus or certiorari; and the plaintiff is entitled in this Court to a declaration that he has shown that he has acquired ipso facto a Polish nationality so as to facilitate his obtaining a mandamus against the Administrator.

[TOMLIN J. The plaintiff has not shown within six

months that he has acquired a Polish nationality, and he is therefore out of time as regards the Treaty. Under the Order the plaintiff's property is subject to the charge, unless he shows to the satisfaction of the Administrator that he has acquired Polish nationality.]

The Administrator is not intended to be constituted the final tribunal by the Order. He is merely an administrative officer, to whom proofs of the acquisition of a Polish nationality had first to be submitted. The plaintiff having done that is free to come to the Court. There would have been nothing to prevent the plaintiff immediately after the Treaty of Peace (Austria) Order came into force coming to the Court to have his nationality determined; and it cannot be doubted that any decision by this Court as to this would have been accepted by the Administrator.

[They referred to *Stoeck* v. *Public Trustee* (1) and *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2)]

Sir T. W. H. Inskip K.C. in reply. The whole question is whether after the Administrator has expressed himself as not satisfied that the plaintiff acquired ipso facto a Polish nationality, the plaintiff can come to the Court and set up the case that he is free from the Treaty of Peace charge. It is submitted that the plaintiff's only remedy is by mandamus ordering the Administrator to hear and determine according to law, if it be shown that he had behaved arbitrarily: *Board of Education* v. *Rice.* (3) Art. 249 (*b*) of the Treaty only gave the Allied or Associated Powers an option to create a charge, but it was the Treaty of Peace (Austria) Order, 1920, that created it, and under that Order the plaintiff as a national of the former Austrian Empire can only escape the charge by satisfying the Administrator that he ipso facto acquired a Polish nationality. No decision of the Court that he had done so would release his property from the charge.

Cur. adv. vult.

(1) [1921] 2 Ch. 67. (2) [1915] 2 K. B. 536, 556.
(3) [1911] A. C. 179, 182.

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1924. March 13. TOMLIN J. This matter has come before me for the determination of a question which is said to be a preliminary question in the action.

In order to render intelligible the point which falls to be considered it is necessary to state shortly the nature of the action and of the plaintiff's claim therein. The action is against the Administrator of Austrian Property, whose office is created by the Treaty of Peace (Austria) Order, 1920, for declarations in effect that the plaintiff's property in His Majesty's dominions is not subject to the charge created by the Order.

The plaintiff was born in Vienna in 1877. His father was born in territory which now forms part of the Republic of Poland. It is not disputed that the plaintiff was originally a national of the former Austrian Empire and that prima facie if he was such when the Treaty of St. Germain-en-Laye came into force his property in question is subject to the charge created by the Order. The plaintiff however seeks to escape from the clutches of the charge in two alternative ways. First, he alleges that by reason of a law passed by the Provisional National Assembly of the State of Austria in December, 1918, and certain acts done thereunder he had before July 16, 1920, the date when the Treaty of St. Germain-en-Laye came into force, ceased to be a national of the former Austrian Empire, and on this footing he claims a declaration that his property did not become subject to the charge created by the Treaty of Peace (Austria) Order, 1920, and as to this part of the action no question arises on this application. Secondly, he alleges that even if he was on July 16, 1920, a national of the former Austrian Empire he acquired Polish nationality ipso facto in accordance with the provisions of the Treaty of St. Germain-en-Laye and that he has shown or is entitled to show that he has done so, with the result that he is not to be considered a national of the former Austrian Empire within the meaning of art. 249 (*b*) of the Treaty, being one of the articles scheduled to the Order, and on this footing he claims " A declaration that he has shown that he has acquired *ipso facto* in accordance with the provisions of

the said Treaty the nationality of the Republic of Poland and that he is not a National of the former Austrian Empire within the meaning of the said Treaty and the said Treaty of Peace Order, and that his property, rights and interests in His Majesty's Dominions are not subject to be charged under the said Treaty and the said Treaty of Peace Order."

The preliminary point with which I have to deal relates only to this second or alternative claim, and arises in this way. The Treaty by art. 249 reserves to the Allied and Associated Powers the right to retain and liquidate all property, rights and interests which belonged at the date of the coming into force of the Treaty to nationals of the former Austrian Empire, and by the same article further provided as follows: "The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State. Persons who within six months of the coming into force of the present Treaty show that they have acquired *ipso facto* in accordance with its provisions the nationality of an Allied or Associated Power, including those who under arts. 72 or 76 obtain such nationality with the consent of the competent authorities, or who under arts. 74 or 77 acquire such nationality in virtue of previous rights of citizenship (pertinenza) will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph." Art. 70 of the Treaty of Peace provides as follows: "Every person possessing rights of citizenship (pertinenza) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto* to the exclusion of Austrian nationality the nationality of the State exercising sovereignty over such territory." By cl. 4 of the annex to arts. 249 and 250 of the Treaty it was provided that "all property, rights and interests of nationals of the former Austrian Empire within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith" might be charged by that Allied or Associated Power with payment of

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amounts due in respect of certain claims of nationals of that Allied or Associated Power. Art. 248 of the Treaty and its annex provides for an optional method by means of clearing offices for the settlement of certain classes of pecuniary obligations outstanding between nationals of one of the contracting Powers and nationals of an opposing Power, and where this optional method has been adopted (as is the case between this country and Austria) the proceeds of the liquidation under art. 249 have under the provisions of that article to be credited to the Power of which the owner of the property liquidated is a national through the Clearing Office established under art. 248.

By the Treaties of Peace (Austria and Bulgaria) Act, 1920, s. 1, sub-s. 1, it was provided that His Majesty might make such appointments, establish such offices, make such Orders in Council and do such things as appear to him to be necessary for carrying out the Treaty, and for giving effect to any of the provisions of the Treaty, and by sub-s. 2 that any Order in Council made under that Act might "provide for the imposition, by summary process or otherwise, of penalties in respect of breaches of the provisions thereof." By the Treaty of Peace (Austria) Order, 1920, as amended by subsequent Orders, after reciting the fact of the signature of the Treaty of St. Germain-en-Laye and after reciting the Treaties of Peace (Austria and Bulgaria) Act, 1920, and that the Treaty contained the sections set out in the Schedule to the Order (being in fact the sections comprising arts. 248 to 262 inclusive of the Treaty with their respective annexes), it was ordered (so far as is material to this case) as follows: "1. The Sections of the Treaty set out in the Schedule to this Order shall have full force and effect as law, and for the purpose of carrying out the said Sections the following provisions shall have effect:—(i.) There shall be established in the United Kingdom a Clearing Office under the control and management of such person (hereinafter referred to as the Administrator) as the Board of Trade may appoint for the purpose. . . . . (ii.) It shall not be lawful for any person to pay or accept payment of any enemy debt except in cases

where recovery thereof in a Court of law is allowed as hereinafter provided, otherwise than through or by leave of the Clearing Office. . . . . (ix.) All property, rights and interests within His Majesty's Dominions or Protectorates belonging to nationals of the former Austrian Empire at the date when the Treaty came into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged." Then there is set out the nature of claims by British nationals which are the subject matter of the charge. Under sub-s. (x.): "With a view to making effective and enforcing such charge as aforesaid—(*a*) The Administrator shall have such powers and duties as are hereinafter provided." Then a number of powers are conferred on the Administrator, including: "(*g*) the Court may on the application of the Administrator require any person known or suspected to have in his possession or under his control any property, right or interest subject to the charge, including any person known or suspected to owe a debt to a national of the former Austrian Empire, or any person who claims that any property, right or interest belonging to him is not subject to the charge by reason of his not being a national of the former Austrian Empire, or any person whom the Court may consider capable of giving information with respect to the same, subject to payment or tender of reasonable expenses of his attendance, to attend as a witness and to give evidence or produce documents before the Court or before such officer as the Court may appoint for the purpose of examining into the matter. . . . ." "(xiii.) The Administrator shall apply the sums received by him in satisfaction of the claims, debts and compensation mentioned in sub-section (ix.) of this Article." Then there are other provisions, such as sub-s. (xvii.), which provides that proceedings may be taken by and in the name of the Administrator, and sub-s. (xix.): "A certificate signed by the Administrator that an order or other instrument purporting to be made or issued by the Clearing Office or by the Administrator is so made or issued shall be conclusive evidence

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of the facts so certified." Art. 2 of the Order is as follows: "For the purposes of the foregoing provisions of this Order, but not including the Schedule therein referred to— . . . . The expression 'nationals of the former Austrian Empire' does not include persons who within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired ipso facto in accordance with its provisions nationality of an Allied or Associated Power, including those who under arts. 72 or 76 of the Treaty obtained such nationality with the consent of the competent authorities, or who under arts. 74 or 77 thereof acquired such nationality by virtue of previous rights of citizenship."

The plaintiff sought to show before the Administrator that he had acquired Polish nationality ipso facto in accordance with the provisions of the Treaty. He failed to make out his case to the satisfaction of the Administrator within six months from July 16, 1920, but the Administrator, regarding himself as free to waive this time limit, gave him a further opportunity, and after an examination of the plaintiff under art. 1 (x.) (*g*) of the Order the Administrator on July 3, 1922, decided that the plaintiff had not shown to his satisfaction that he had acquired ipso facto under the provisions of the Treaty Polish nationality. Therefore the plaintiff began the present action, and statements of claim and defence were delivered.

[His Lordship then stated the terms of the preliminary question in its original and amended form and continued:] Now it is plain to me that the only question which I can determine on this application is some question which is preliminary to the issues raised by the action as constituted. I cannot adjudicate upon any more general question.

The point in the case as I understand it is whether after the decision of the Administrator that the plaintiff has not shown to his, the Administrator's, satisfaction that the plaintiff ipso facto acquired under the provisions of the Treaty a Polish nationality the plaintiff can, for the purpose of establishing the exception of his property from the charge under the Orders, come to the Court in an action framed

as this action is framed and in effect appeal against the Administrator's decision on the point or invite the Court to ignore or go behind the Administrator's decision.

I am not sure that the preliminary question, either as originally framed or as amended, expresses clearly the question which seems to me to be the only one that I can decide.

How does the matter stand? The Treaty excludes from the category of property, rights and interests which may be liquidated the property, rights and interests of those who within six months of the coming into force of the Treaty show (it does not in terms say to whom it is to be shown) that they have acquired ipso facto in accordance with the provisions of the Treaty the nationality of an Allied or Associated Power. The Treaty per se of course forms no part of the municipal law of this country. So far however as the Treaty is given the effect of law by the Treaties of Peace (Austria and Bulgaria) Act, 1920, and the Treaty of Peace Orders made thereunder, it forms part of the municipal law, and the rights of the plaintiff must be determined by reference to such Act and Orders.

Now under the Act it is provided that His Majesty may make such Orders in Council and do such things as appear to him to be necessary for carrying out the Treaty. The Treaty of Peace (Austria) Order, 1920, and the amending Orders were made under this power, and in effect do the following things: (1.) They give the effect of law to the scheduled sections of the Treaty, which include arts. 248 and 249; (2.) They establish a Clearing Office under the control and management of an Administrator for carrying out the Clearing Office provisions of the incorporated sections of the Treaty; (3.) They give effect to the right of retention and liquidation reserved by art. 249 of the Treaty by creating a charge for the satisfaction of the claims of certain British nationals upon all property, rights and interests within His Majesty's Dominions belonging to nationals of the former Austrian Empire at the date when the Treaty came into force; and (4.) For the purpose of the provisions of the

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order, but not for the purposes of the provisions of the scheduled parts of the Treaty they exclude from the expression "nationals of the former Austrian Empire" persons who within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired ipso facto in accordance with the provisions of the Treaty the nationality of an Allied or Associated Power.

Assuming that the plaintiff was at the date when the Treaty came into force a national of the former Austrian Empire, is he able to say that upon the true construction of the Act and Orders and in the events which have happened the charge does not affect his property, rights and interests in His Majesty's Dominions? He cannot do this unless he establishes that he is not within the definition contained in the Orders a national of the former Austrian Empire.

He has attempted to show to the satisfaction of the Administrator that he had ipso facto acquired under the provisions of the Treaty Polish nationality. It is admitted for the purpose of this application that the Administrator has determined (after waiving the six months' time limit prescribed by the Orders) that the plaintiff has failed to make good this position to the satisfaction of the Administrator, and it is not suggested that the plaintiff has established or attempted to establish this position before any other tribunal within six months of the date when the Treaty came into force or at all.

Can the plaintiff now come to the Court in this action as framed (and this is the only matter I can decide) and invite the Court to ignore the Administrator's finding and, if satisfied after an independent investigation that the plaintiff did ipso facto under the provisions of the Treaty acquire Polish nationality, to declare that the plaintiff's property is free from the charge?

I think that upon the true construction of the Orders the question of nationality is for the Administrator. The Orders may not be framed in the happiest way, inasmuch as the

duty of determination is imposed on the Administrator not substantively but only by virtue of the terms of the definition clause limiting the meaning of the expression "national of the former Austrian Empire"; but there does not seem to be any escape from the conclusion that the duty is in fact imposed or that the plaintiff cannot elude the charge unless he brings himself within the category of persons who are not included in the expression "nationals of the former Austrian Empire," and this, having regard to the terms of the Orders, he will not do by proving to-day before this Court the fact of his alleged acquisition of Polish nationality. If this be so, I am satisfied that in this action and upon the allegations in his pleadings in this case the Court cannot investigate the question of fact as to nationality which the plaintiff desires to have investigated, and can only determine, whether, having regard to the Administrator's decision, the plaintiff has or has not established exemption from the charge. Indeed, if the Court were now to investigate the question of nationality afresh and to come to a conclusion different from that reached by the Administrator, the plaintiff would still be in the difficulty that he had not established his position within the time limited by the Treaty and the Orders, and I do not see that any power is given to the Court to extend the time.

It is not for me to consider, and I do not express any opinion, whether the plaintiff can on a proper case made by mandamus, certiorari or otherwise, compel a reconsideration by the Administrator of his case or a review of the Administrator's decision by the Court. It may be that in regard to matters the determination of which is left to him the Administrator is subject to that measure of control by the Courts which was indicated by Lord Loreburn L.C. in *Board of Education* v. *Rice* (1), but this case is not framed for relief of this character.

Against the view of the case which I have indicated it was urged on the plaintiff's behalf that he is entitled to bring an action merely for a declaration that he is a Polish national

(1) [1911] A. C. 182.

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and that the Court would be bound to adjudicate thereon, and if it adjudicated in his favour the Administrator would be bound to accept the finding of the Court and modify his conclusion accordingly, or at any rate that the plaintiff would be in a stronger position for applying for a release from the charge. Such an action may be possible—I express no opinion upon it—but prima facie I should have thought that in such an action the presence of the Attorney-General would be necessary. At any rate this action is not framed on those lines. It was also somewhat more faintly urged that there was some element in the Orders which was ultra vires and that there was no power to place in the Administrator's hands by means of the Orders the determination of the question of nationality. Having regard to the language of art. 249 of the Treaty it seems to have been necessary to prescribe by municipal legislation some means by which the question of nationality could be determined, and I am unable in these circumstances to see on what ground any suggestion of ultra vires can be made.

My conclusion therefore is that in this action as framed the Court ought not for the purpose of adjudicating upon the claim raised by the second declaration to go behind the decision of the Administrator and investigate independently the question of nationality ; and I will make an order that the Court being of the opinion that I have expressed there will be no order except that the costs shall be costs in the action.

H. C. G.

C. A.

The plaintiff appealed. The appeal was heard on May 12, 1924.

Schiller K.C. and *August Cohn* for the appellant repeated the arguments used by them in the Court below.

Sir T. W. H. Inskip K.C. and *Roland Burrows* for the respondent were not called upon to argue.

POLLOCK M.R. This appeal comes to the Court from an order made by Tomlin J. on March 13 of this year, which is in form an answer to the question put in the course of

the interlocutory proceedings in the case pursuant to an order made on November 7, 1923. The action was brought by Baron Reitzes de Marienwert against the Administrator of Austrian Property claiming two alternative declarations. The first declaration was "that he was not on July 16, 1920, and is not a national of the former Austrian Empire and that his property, rights and interests in His Majesty's Dominions are not subject to be charged under the Treaty of Peace of St. Germain-en-Laye and the Treaty of Peace (Austria) Order, 1920." The second declaration was "that he has shown that he has acquired ipso facto in accordance with the provisions of the said Treaty the nationality of the Republic of Poland and that he is not a national of the former Austrian Empire within the meaning of the said Treaty and the said Treaty of Peace Order and that his property, rights and interests in His Majesty's Dominions are not subject to be charged under the said Treaty and the said Treaty of Peace Order." In the course of the action it was considered that it would be advantageous that the matter in effect proposed under the second declaration should be brought to the test before the learned judge, because it would possibly relieve the plaintiff (if successful) from bringing certain evidence which would be expensive to obtain in the course of the trial of the case, and apparently for reasons good and sufficient, the order of November 7, 1923, was obtained. The question as it then came before Tomlin J. was this: "Whether the decision of the Administrator that he is not satisfied that the plaintiff has in the manner set forth in art. 2 of the Treaty of Peace (Austria) Orders, 1920/1921, acquired nationality other than Austrian is final and conclusive so that it cannot be questioned by way of an action for declaration." The learned judge has set out the steps and the provisions of the Treaties and the Orders which are necessary for the full understanding of the question which was propounded to him. I do not intend to recapitulate them all; it is sufficient to say that as in the case of the Treaty of Versailles so in the case of the other Treaties, and particularly with regard to the Treaty with Austria signed

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at St. Germain-en-Laye, which came into force on July 16, 1920, a system has been set up whereby there may be a solution of outstanding matters between the nationals of the parties to the Treaty. Art. 249 of the Austrian Treaty deals with matters in pari materia with those dealt with by art. 297 of the Treaty of Versailles. The procedure has raised points from time to time which have come before the Court, but it was declared in that article that subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserved the right to retain and liquidate all property, rights and interests belonging, at the date of the coming into force of the present Treaty, to the nationals of the Power with whom the Treaty was made. Art. 249 is the relevant article which deals with this similar process of dealing with the property, rights and interests of Austrians. In order to enable His Majesty to carry into effect the Treaty of St. Germain (as well as the Treaty of Peace with Bulgaria which is not material), the Treaties of Peace (Austria and Bulgaria) Act, 1920, was passed. Power was thereby given to His Majesty to make such appointments, establish such offices, make such Orders in Council, and do such things as appeared to him to be necessary for carrying out those Treaties. In pursuance of those powers, an Order in Council, to which our attention has been drawn, was made which substantially follows the standard set up originally by the Order in Council issued for the enforcement and carrying into effect of the Treaty of Versailles. In order to decide whether or not there is to be a right to retain and liquidate ex-enemy property rights and interests, it is of course important to ascertain whether or not the property, rights or the interests in question, did belong at the date of the coming into force of the particular Treaty, to a national of the country with whom the Treaty was made. In the present action Baron Reitzes in his statement of claim alleges that he was born on December 27, 1877, at Vienna, and was until the events thereinafter set out, a national of the former Austrian Empire. As the decision of the learned judge was sought and obtained in the course of the

interlocutory stages of the action, we are to take the allegations made in the statement of claim as provable, and what the defendant alleges is that: Even assuming that those facts were proved, the plaintiff would not be justified in coming to the Court in respect of this particular declaration for which he asks in the second paragraph of his claim. It is to be observed that it is only with the second declaration that the learned judge deals, and of course the present appeal is confined also to the same question. That question is whether the decision made by the Administrator is final and conclusive, so that it cannot be questioned by way of an action. The plaintiff, as I have said, alleges and affirms that he was originally an Austrian national. Prima facie, therefore, a Treaty made between His Majesty and Austria would apply to the plaintiff, who is an Austrian national, but the Treaty of Peace Order has provided in the interpretation clause (art. 2) that: "The expression 'nationals of the former Austrian Empire' does not include persons who, within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired ipso facto in accordance with its provisions nationality of an Allied or Associated Power, including those who under arts. 72 or 76 of the Treaty obtained such nationality with the consent of the competent authorities, or who under arts. 74 or 77 thereof acquired such nationality by virtue of previous rights of citizenship." The plaintiff claims that he is, for the purposes of the Treaty of Peace Order, a Pole, and he alleges that, although his nationality was originally Austrian, he has ceased to be an Austrian, and is, for all relevant purposes, a Pole. The matter was brought before the Administrator upon certain materials, and the Administrator, or his representative appointed for that purpose, heard the claim of the plaintiff, that he was not included within the persons who were to be deemed to be nationals of the former Austrian Empire; and on request made to him, the Administrator reheard and reconsidered the matter, because further documents were placed before him. But after he had given the matter

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attention not once, but twice, he came to the conclusion that the plaintiff was a person who was not discharged from being a national of the former Austrian Empire within this provision of art. 2 of the Treaty of Peace Order. The plaintiff contends that the decision of the Administrator ought, in some way, to be brought under review to this Court. He says that the Administrator ought only to deal with persons who acquire their particular nationality under the Treaty of St. Germain-en-Laye and that in the case of a person who was an Austrian, but who, for some time, has been a Pole, the Administrator is not the person to deal with that point if it is disputed. It is right that I should point out, as indeed I hope I have done, that the question which arises before this Court is a very narrow one. It relates only to the second declaration which the plaintiff claims, and, indeed, it may be still further narrowed by attention being given to the actual terms of the order and the decision of Tomlin J. I desire to say just a word or two on this particular claim of the plaintiff. He alleges that his nationality is that of a Pole, and that before ever the Treaty of St. Germain-en-Laye was signed, Poland had been set up and had resumed her independence. That is true : the Treaty with Austria did not set up a Polish republic. That is provided for by the Treaty of Versailles, which contains elaborate provisions, beginning with art. 87 and going down to art. 93, and comprising the whole of Part III, s. VIII., of that Treaty. In art. 87 it is declared that " Germany, in conformity with the action already taken by the Allied and Associated Powers, recognises the complete independence of Poland." It is clear from that statement that the Allied and Associated Powers had at a still earlier date taken action for the purpose of setting up the independence of Poland, but it remains true that the actual independence of Poland was declared in pursuance of the action and in order to confirm the action already taken by the Allies, in Part III., s. VIII., of the Treaty of Versailles. The effect of that is of some little importance, because it might be possible that certain persons

had ceased to be Austrians before ever the Treaty of St. Germain-en-Laye came into force. But such an argument even if it be sound has no relevance to the question before the Court. In the Austrian Peace Treaty Order several categories of persons are dealt with in the sense that the Order is not to include persons who, within six months, show to the satisfaction of the Administrator that they have either ipso facto acquired, in accordance with the provisions of the Treaty, nationality of an Allied or Associated Power, or have done so by complying with arts. 72 or 76, or under arts. 74 or 77. All these questions, which are bound to arise and which it was foreseen must arise, are to be dealt with by the Administrator, and those who claim that they come within the exceptions contained in the Treaty of Peace Order must show that to the satisfaction of the Administrator. He is the persona designata to deal with those claims. In other words, he is the persona designata who is to determine whether or not a particular person is entitled to rely upon that proviso, as I will call it, contained in art. 2 of the Treaty of Peace Order, which enables a person who was once an Austrian national to show that he is not to be treated, for the purpose of the Treaty of Peace Order, as continuing to be so. That decision rests, in my judgment, with the Administrator. There are other passages to which our attention has been called, as, for instance, art. 1 (ix.) (*b*), and its proviso, which enables a charge to be made for the costs of the proceedings before the Administrator, indicating that the Administrator was to deal with the matter as the tribunal before whom this question was to be settled, and no one else. The plaintiff says that, in spite of the very clear designation of the Administrator and his functions, he is entitled to raise the point again, and, whatever the decision of the Administrator has been, to bring before the Court the question decided by him. In my opinion, the question lies within the sphere of the Administrator to determine, and inasmuch as it has been determined by him and no charge of misconduct has been made against him, the question has been properly determined by the Administrator

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and cannot be raised again before the Court. The onus of satisfying the Administrator lies upon the national who seeks to do so. If he shows that having prima facie been within the Order he has ceased to be, that right can only be claimed and exercised by him if he fulfils the actual terms of the conditions subsequent under which he is entitled to rely upon it. It appears from what I have said, and for the reasons which I have given, that the Administrator's decision on this matter is intended to be final, but it is to be observed that the decision is a narrow one and does not cover questions which will arise on the first declaration asked by plaintiff. I am satisfied, however, that the learned judge has put this question to himself, and has in the order made by him rightly answered it in the sense that the decision of the Administrator cannot be questioned in an action for a declaration to a contrary effect. I do not think it is necessary to say more. The position of Poland is no doubt somewhat peculiar in these Treaties, and it is true, as Mr. Schiller has pointed out, that Poland was a signatory to both Treaties, but this really has no relevancy at all to the question we have to decide, which is simply this: whether or not the plaintiff is entitled to question the decision of the tribunal set up for a particular purpose and which, if the decision had been in his favour, would have enabled him to say within the proviso contained in the Treaty of Peace Order, that he had satisfied the particular tribunal that he was not within the ambit of the Order. He has not satisfied that tribunal; that tribunal had authority committed to it, and this Court cannot question the decision of that tribunal—namely, the Administrator—which was properly given in accordance with the terms of the Order.

I will say nothing about the limit of six months which is referred to; I am not sure that it was possible to carry that provision out, because the tribunal was not set up within the time limit imposed by the terms of the Order; but however that may be, I think the time limit was in fact waived in this case, because the proceedings were continued before the tribunal at a time when it would have been useless to

continue them if the time limit of six months had been insisted upon. Inasmuch, however, as upon the larger question I am against the plaintiff, I think the appeal ought to be dismissed and dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The plaintiff by his action seeks two alternative declarations. The first is a declaration " that he was not on July 16, 1920 " (which was the day on which the Treaty of St. Germain-en-Laye came into force)," and is not a national of the former Austrian Empire, and that his property, rights and interests in His Majesty's Dominions are not subject to be charged under the Treaty of Peace of St. Germain-en-Laye and the Treaty of Peace (Austria) Order, 1920." That declaration is not in any way affected by the order of Tomlin J. and will not be affected therefore by our order. Nothing now turns upon it, and there is nothing in what has taken place to prevent the plaintiff going on with his action and obtaining, if he can, a declaration in that form and to that effect. But he seeks for a further declaration. [His Lordship read the second declaration and continued :] The point with regard to that declaration is this : that by the Treaty of Peace and that part of it, in particular, which is made part of the law of this country by the operation of the Treaty of Peace (Austria and Bulgaria) Act, 1920, and the Treaty of Peace (Austria) Order, 1920, a special category of persons is created who, by the means thereby set forth, have an opportunity of satisfying the Court that they are not citizens of the former Austrian Empire and that their property is not subject to the charge created by the Treaty, with the nature of which we are all in these Courts by this time familiar ; and the plaintiff in his statement of claim alleges facts which he says would, if proved, bring him within that special category of persons ; and he says that those facts he can prove. The defendant, the Administrator of Austrian Property, sets up this defence : " It was a necessary condition for such a release " (that is the release of the plaintiff's property) " that he should show to the satisfaction of the Administrator

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that he was not a national of the former Austrian Empire within the meaning of art. 2 of the said Orders. He failed to show to the satisfaction of the Administrator within the said period of six months or within an extended period allowed to him by the Administrator for that purpose, or at all, that he was not a national of the former Austrian Empire." It is admitted that the facts alleged by the Administrator are true and that the plaintiff did not show to his satisfaction that he had acquired the exemption on which he relied; and of course it was obvious that if the defendant should establish in point of law that defence at the trial it would be quite useless for the plaintiff to incur the expense, which might be considerable, of proving the facts, on which he relies to bring himself within the special category of persons; and accordingly he obtained from Tomlin J. an order directing the trial of a preliminary point intended to raise, and raising, the question whether in point of law that statement made by the Administrator would be an answer to the plaintiff's claim to be placed in the special category of persons; and it was under that order that Tomlin J. heard and determined the preliminary point. The result of his determination was that it was not open to the plaintiff, inasmuch as he had not satisfied the Administrator that he came within the special category, to establish that fact by any other means or before this tribunal. I need not read the order that in fact he made. In order to see whether the order thus made by Tomlin J. was correct it is necessary to refer, and I will do so very shortly indeed, to one or two provisions of the Treaty of Peace and the Treaty of Peace Order. The Treaty is the Treaty of St. Germain-en-Laye made between the Allied and Associated Powers of the one part and Austria of the other part; and amongst the Powers enumerated as the Allied and Associated Powers is Poland. Now that part of Poland which was known as the Province of Galicia was formerly a province of the Austro-Hungarian Empire and a national of Galicia would be a national of the Austro-Hungarian Empire; or rather, to be quite accurate, I suppose would be a national of Austria. The Treaty of

Peace contained, in art. 249 (*b*), this provision: "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Austrian Empire," and then it contains this further provision, creating what I have referred to as the special category of persons who may be exempt from that provision: "Persons who within six months of the coming into force of the present Treaty show that they have acquired ipso facto in accordance with its provisions the nationality of an Allied or Associated Power . . . . will not be considered as nationals of the former Austrian Empire within the meaning of this paragraph." Therefore, to bring themselves within the category of those persons who are excluded from the description of nationals of the former Austrian Empire applicants for exemption had to show that they had acquired ipso facto in accordance with the provisions of the Treaty the nationality of an Allied or Associated Power. The only provision of the Treaty to which we have been referred as being one under which it is possible to show the acquisition ipso facto of the nationality of an Allied or Associated Power is art. 70: "Every person possessing rights of citizenship (pertinenza) in the territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain ipso facto to the exclusion of Austrian nationality the nationality of the State exercising sovereignty over such territory." Now what the plaintiff says is that he possesses rights of citizenship in Galicia, in Poland that is to say, and that that being so he obtains ipso facto, to the exclusion of Austrian nationality, the nationality of Poland, and that Poland is one of the Allied and Associated Powers, and therefore if he shows that fact within six months of the coming into force of the Treaty he will not be considered as a national of the former Austrian Empire within the meaning of art. 249. I now turn to the Treaty of Peace Order. That Order contains (inter alia) the following provision (art. 1 (ix.)): "All property, rights and interests

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within His Majesty's Dominions or Protectorates belonging to nationals of the former Austrian Empire at the date when the Treaty came into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation, or other dealings therewith, are hereby charged" with certain sums of money, which I need not specify, and then, with a view of dealing with that particular category of persons to which I have alluded, the Order proceeds to provide (art. 2) that: "The expression 'nationals of the former Austrian Empire' does not include persons who, within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired ipso facto in accordance with its provisions nationality of an Allied or Associated Power." That Order in Council, having been duly made under the provisions of the Treaty of Peace Act, is part of the law of the land and it has all the force of a statute. Therefore, for the purposes of our law, an addition is made to the description contained in the Treaty of Peace itself of the category of persons who are by that particular provision exempted from the charge, and that added description is that they must show to the satisfaction of the Administrator that they come within it. It is admitted that the plaintiff has not shown to the satisfaction of the Administrator that he comes within that category, and it seems to me that under those circumstances the order of the learned judge is perfectly correct: and that there are no means provided for bringing the persons in question within that particular category of exemption except by establishing the particular fact to the satisfaction of the Administrator. That the plaintiff admittedly has not done; therefore he does not bring himself within the particular description, and that being so, it is not open to him in the present action as framed to obtain the second of the two declarations for which he asks. Whether, assuming that, he has any other means of setting himself or his property free from the charge created by the Order I do not know. With reference to that all I would say is that the exemption

provided by the passage I have read is not exclusive, and that it may well be that there are grounds open to the plaintiff upon which he may obtain the first of the two declarations; but so far as the present order is concerned it seems to me to be perfectly correct, and the appeal must be dismissed.

SARGANT L.J. I am of the same opinion. The question submitted to Tomlin J. and his decision thereon affect only the second declaration sought by the statement of claim. The relief in respect of the first declaration is entirely unaffected. By his second declaration the plaintiff seeks to establish that he has escaped from the charge imposed on Austrian nationals by virtue of the special relief provided for by art. 70 of the Treaty. That Treaty is given effect to in this country by the Treaty of Peace (Austria and Bulgaria) Act, 1920, and by the Treaty of Peace (Austria) Order, 1920, as subsequently amended; and we have to look not at the language of art. 70 of the Treaty itself but at that of the Order. The provisions of this Order which correspond with art. 70 are to be found in art. 2 of the Order, which is a definition section, and it provides, amongst other things, that: "The expression 'nationals of the former Austrian Empire' does not include persons who, within six months of the coming into force of the Treaty show to the satisfaction of the Administrator that they have acquired ipso facto in accordance with its provisions nationality of an Allied or Associated Power." This Order prescribes a road to be followed by any one seeking to obtain the relief sought by the plaintiff in his second declaration; such a person has to go to the Administrator and to prove the necessary facts to his satisfaction. The plaintiff has done so and has attempted to prove these facts, but has not succeeded, and having failed to do so has not taken any steps to impugn or quash the decision of the Administrator, such, for instance, as those which were taken in *Board of Education* v. *Rice* (1), referred to by the learned judge. On the contrary he tries to start afresh and to choose a quite different route to his

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goal by asking the Court to make a declaration to an effect contrary to the decision arrived at by the Administrator. In my opinion that alternative route is not open to him; the only road open to him is that pointed out by the Order. I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Freshfields, Leese & Munns.*
Solicitor for respondent: *Solicitor to the Clearing Office.*

W. I. C.

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[1923. A. 2487.]

Vendor and Purchaser—Contract for Purchase of long leasehold—Onerous and unusual Covenant—Liability of Lessee for Costs of Lessor's Solicitor and Surveyor—Duty of Vendor to disclose—Rescission—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

The defendant, a married woman, signed a written agreement to purchase from the plaintiff a lease for ninety-nine years of a newly erected dwelling house at Shepherd's Bush, London, in consideration of a premium of 527*l.* 10*s.* and a ground rent of 6*l.* 6*s.* Before signing the contract the defendant asked to see a copy of the lease, and was told by the vendor's agent that it was quite in the "ordinary form." Relying on this representation the defendant signed the contract for the purchase after paying 327*l.* 10*s.* as part of the premium or deposit, and was let into possession of the house. The draft lease when produced contained (inter alia) a covenant by the lessee "to pay all costs, charges and expenses (including solicitors' costs and surveyors' fees) incurred by the lessor for the purpose of or incidental to the preparation and service of a notice under s. 14 of the Conveyancing Act, 1881, requiring the lessee to remedy a breach of any of the covenants on the part of the lessee. . . . ."

The plaintiff alleged that this covenant was contained in the form of lease in use on this estate, and on the defendant declining to sign the lease unless it was omitted therefrom, he brought an action for specific performance of the written agreement:—

Held, that in a case such as this, of a long lease of a new house at a moderate ground rent, the covenant in question was not an "ordinary" or even a reasonable one, but was an onerous covenant to which the purchaser's attention ought to be called by the vendor, and the lease containing this covenant was not a lease "in the ordinary form."

Held, therefore, that the action failed, and the defendant was entitled, on her counterclaim, to rescission of the contract and repayment of 327*l.* 10*s.*, with interest at 4 per cent.

THE plaintiff, Morris Joseph Allen, was a builder and contractor at Shepherd's Bush, Kensington, in the county of London; and the defendant, Lilian Maud Smith, was a married woman whose husband was a motor driver. In 1923 the defendant and her husband were negotiating with the plaintiff for the purchase of the lease of a newly erected dwelling house, No. 7 Batson Street, Shepherd's Bush, in consideration of a premium of 527*l.* 10*s.*, the lease being for a term of ninety-nine years from June 24, 1922, at the annual ground rent of 6*l.* 6*s.* On September 1, 1923, the defendant paid to the plaintiff a deposit of 10*l.* in respect of the proposed purchase, and obtained a receipt for it from Thomas G. Stuart, the plaintiff's manager. The defendant was anxious to obtain possession of the house, and informed the plaintiff that she could find 327*l.* 10*s.* towards the premium, and proposed to apply to the Goldhawk Mutual Benefit Society for an advance of 200*l.* to enable her to complete the purchase. The plaintiff said that if the defendant could pay 327*l.* 10*s.* she could go into immediate possession.

On September 4, 1923, the defendant went to the plaintiff's office with 327*l.* 10*s.* in notes, and Mr. Stuart produced a contract for the purchase of the lease of the house in question for her to sign.

This contract contained a statement that 327*l.* 10*s.* had been paid by the purchaser to the vendor as a deposit or part payment of the purchase money, and the balance was to be paid on September 29, when the purchase was to be completed.

By cl. 4 of the agreement it was provided that the lease should be prepared in the form required by the plaintiff's solicitors, and should be in the form in use on the estate of which the said dwelling house formed part. On reading over this contract the defendant asked for a copy of the lease, and was told by Mr. Stuart that he had not got one with

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him, but that it was quite in the ordinary form, and if there was anything to which the defendant's solicitor would not agree she would not be compelled to complete the purchase. The defendant then signed the agreement for purchase, paid the 327*l.* 10*s.*, and took possession of the house on September 13. Shortly afterwards a copy of the draft lease prepared by the plaintiff's solicitors was submitted to the defendant. It contained the following covenant on the part of the lessee, which she now saw for the first time :— "And also will pay all costs, charges, and expenses (including solicitors' costs and surveyors' fees) incurred by the lessor for the purpose of or incidental to the preparation and service of a notice under s. 14 of the Conveyancing Act, 1881, requiring the lessee to remedy a breach of any of the covenants on the part of the lessee herein contained, notwithstanding forfeiture for such breach shall be avoided otherwise than by relief granted by the Court." This covenant was immediately objected to by the defendant's solicitors on her behalf and was struck out, but was insisted upon by the plaintiff, who asserted that it was an ordinary and usual covenant and not oppressive.

By his statement of claim the plaintiff claimed specific performance of the agreement of September 4, 1923; alternatively, that he was entitled to forfeit the deposit paid on the signing of the agreement, and delivery up of possession of the dwelling house.

By her defence the defendant pleaded that the covenant in question was unusual and oppressive, but she was ready to pay the balance of the purchase money or premium and to complete the agreement by executing the lease subject to the omission of the covenant in dispute.

By her counterclaim she asked alternatively for the rescission of the agreement and repayment of 327*l.* 10*s.* with interest thereon.

The building society to which the defendant applied for 200*l.* refused to make any advance on the security of a lease containing such a covenant. By her counterclaim in the action the defendant asked for rescission of the agreement

and repayment of the 327*l.* 10*s.* with interest thereon. She offered to pay a reasonable occupation rent.

The defendant had expended a sum of 5*l.* 18*s.* 6*d.* in completing the house for occupation by procuring gas to be laid on and preparing for electric light, and was willing to pay a reasonable occupation rent for the house subject to an allowance being made in respect of this 5*l.* 18*s.* 6*d.* expended thereon.

Witnesses were called on both sides, and the result of the evidence sufficiently appears from the judgment.

Clayton K.C. and *E. M. Winterbotham* for the plaintiff. The reason for the insertion of this covenant appears from the dictum of Davey L.J. in *Nind* v. *Nineteenth Century Building Society.* (1) In the present case the lease is in the usual form of a lease on this estate. A similar covenant is given in Underhill's Encyclopædia of Forms and Precedents, vol. vii., p. 196. The defence here suggests an oral variation on September 1 of the written agreement concluded between the parties on September 4. This evidence is inadmissible.

There is no application to rectify the agreement; the defence is that the clause is unusual and oppressive, but there are many instances where a similar covenant has been used, and five leases on this same estate have been lately granted containing this same covenant. Such a covenant has been more frequently used in modern leases, and according to the evidence of Mr. Webster, the vendor's solicitor, it has been inserted in about 50 per cent. of the leases which came before him.

Gover K.C. and *J. A. Hay* for the defendant. This covenant is not usual or ordinary, and it was therefore the duty of the lessor to disclose it to the purchaser before the contract was entered into, or to give the defendant at any rate an opportunity of seeing the form of it.

Here the plaintiff did neither. The draft of the lease did not reach her till September 15 or 17. Her solicitor

(1) [1894] 2 Q. B. 226, 233.

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at once objected to the covenant, and struck it out as being onerous and unusual, but the vendor insisted on its being retained. Further, there was a misrepresentation about the lease by the plaintiff's agent, which entitles the defendant to rescission on her counterclaim. There are many special covenants set out in Key and Elphinstone's Precedents in Conveyancing, 10th ed., vol. i., p. 853, all which would have to be disclosed to a proposed purchaser. The law as to onerous covenants, and the necessity for them to be disclosed to the proposed covenantor is laid down in *Hyde* v. *Warden* (1); *In re Haedicke and Lipski's Contract* (2); and *Molyneux* v. *Hawtrey*. (3)

Clayton K.C. in reply. This is not a "usual" covenant in the old legal sense, and the modern text-books do not give much help in determining what are not "usual" covenants by a lessee: Foà's Landlord and Tenant, 5th ed., p. 376; Hood & Challis's Conveyancing, 7th ed., p. 64. In Underhill's Encyclopædia, p. 196 and subsequent pages, there are some thirty instances where there were covenants to repair, and this covenant was used in all. The three cases relied on by the defendant do not apply to this case. As to the express representation relied upon to affect the terms of the written contract, such parol evidence should be rejected according to *Inglis* v. *Buttery* (4) and *Harnor* v. *Groves*. (5)

EVE J. The plaintiff sues for specific performance of an agreement in writing whereby, in substance, he agreed in consideration of a payment of 527*l.* 10*s.* to grant and the defendant agreed to take a ninety-nine years' lease of a dwelling house situate at Batson Street, Shepherd's Bush, at a moderate ground rent. The defendant, who is a willing purchaser, objects to the lease which has been tendered to her; she says it is not in accordance with the one she was told she was to have when the contract was made and indeed

(1) (1877) 3 Ex. D. 72.
(2) [1901] 2 Ch. 666.
(3) [1903] 2 K. B. 487.
(4) (1878) 3 App. Cas. 552.
(5) (1855) 15 C. B. 667.

is one which she cannot accept, inasmuch as the building society which had provisionally agreed to make her an advance of part of the purchase moneys in common with a large number of other building societies refuses to make any advance upon a leasehold property held under a lease containing the particular covenant to which exception is taken. The covenant is in these terms : [His Lordship read the covenant set out above.] The defendant's case is that the covenant I have read, being of an onerous and unusual character, cannot be insisted upon by the plaintiff, first, because its existence in the proposed lease was not disclosed to her before the contract was concluded, and secondly, because when she and her husband were negotiating the contract and asked for production of the proposed lease they were told that there was no copy at the office, but that it "was the ordinary form of lease without anything unusual or extra-ordinary in it."

The plaintiff denies that any such representation was made, and insists upon his claim to have the covenant included in the lease and, by way of counterclaim, the defendant repeats the defence and claims in the circumstances that the contract may be rescinded, and that the sum of 327*l.* 10*s.* (part of the purchase money already paid by her to the plaintiff) may be repaid with interest. [His Lordship then dealt with the evidence of Mr. and Mrs. Smith and of Mr. T. G. Stuart, the plaintiff's manager, and accepted the accounts given of the transaction in the evidence of the defendant and her husband, and continued :] That is the result of the evidence, but it does not follow that the defence will succeed, because there remains the question whether the inclusion of this covenant in the lease falsifies the statement made by Mr. Stuart, and undoubtedly relied upon by the defendant.

That is really the substance of this action. Is this covenant, the origin of which has been traced in the course of the argument, such an one as imposes on the vendor the obligation of disclosing its existence to an intending purchaser, or is it one which a purchaser cannot object to in a lease

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described as being in the ordinary form and containing nothing unusual or extraordinary ?

I have practically no evidence to assist me in this matter, and very little authority. I am not overlooking the straightforward testimony of Mr. Clifford Webster, a member of the firm of solicitors acting for the plaintiff. He said he was prepared to say that it is not an unusual clause, but when asked whether he was prepared to say that it is a usual or ordinary clause he hesitated and then quite frankly replied : " I do not want to fence with the question, but it is a difficult one to answer. I have had a good deal of experience, and I should say that I have met with it in 50 per cent. of the leases which have passed through my hands." I was struck with the candour with which the witness abstained from committing himself to the opinion that it is an ordinary and usual clause. That is how the evidence stands, and it comes to this, that I must form my own opinion whether the clause can rightly be said to be an ordinary one.

In determining that question it is, I think, material to have regard to the nature of the leasehold interest affected. I am not prepared to say that in the case of property of a nature likely to call for considerable repairs, and held for comparatively short terms, such a clause might not be regarded as a reasonable one to be insisted upon by the lessor, and in such circumstances be regarded as an ordinary one ; but, in my opinion, a very different state of things exists when a new house is being let for a term of ninety-nine years at a moderate ground rent. The chief concern of the landlord in those circumstances is to see that the ground rent is adequately secured, and so long as this is the case, and the house is not allowed to fall into a condition calculated to depreciate the value of his adjoining property, he is not, as a general rule, very active to enforce the covenant to repair. In such a lease this particular covenant cannot, I think, be regarded as an ordinary or even a reasonable one. In other words, I think that in such circumstances it is an onerous covenant to which the purchaser's attention ought to be called by the vendor, and that the vendor selling such a

lease with this covenant in it cannot properly describe it as a lease in the ordinary form with nothing unusual in it.

I cannot see how the facts of this case can be distinguished from those of an ordinary case of vendor and purchaser. The lease which the plaintiff intended to grant was the one which had been drafted and determined upon for use in connection with this property. It was not in one sense the sale of an existing lease, but in fact it was a contract for the sale of the property to be held on this lease and no other. I cannot appreciate the distinction sought to be made on the plaintiff's behalf between the two transactions—the sale of property held under an existing lease and the sale of property to be held under a lease the terms of which were already settled and determined. The result is that, in my opinion, the action fails. If the plaintiff is prepared to grant the defendant a lease without this covenant in it I assume that the defendant is willing to accept it; but if he is not so prepared the action is dismissed with costs. On the counterclaim, the defendant is entitled to judgment for rescission and for repayment of the 327*l.* 10*s.* with interest at 4 per cent., she submitting to be charged a reasonable sum for occupation rent from the period during which she has been in possession. The amount of this occupation rent must be referred to chambers if the parties cannot agree it. The plaintiff must pay the costs of the counterclaim.

Solicitors: *Clifford Webster, Emmet & Coote; F. Shirley Turner & Harrison.*

G. M.

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1924
June 4, 5.

BARSTOW *v.* TERRY.

[1923. B. 4727.]

Copyright—Novel—Dramatic Play founded on Novel—Agreement granting Rights of Production—Construction—Cinematograph Rights—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, *sub-s.* 2; 24, 35.

The plaintiff was the sole authoress of and owner of the copyright in a novel called "The Scarlet Pimpernel." In 1903, in collaboration with her husband, she composed a dramatic version of the novel. By an agreement dated June 10, 1903, the plaintiff and her husband, as authors, granted to the defendants T., as theatrical managers, the right of production of the play during a then forthcoming tour, and at a first-class West End London theatre, for two years; and the agreement further provided that if the production took place within that period then "the entire rights for the United Kingdom, the United States of America, and the Dominion of Canada in the said play became theirs inalienable, and they shall present it when and where they will within the countries aforesaid," paying to the authors 5 per cent. on the gross weekly takings. The defendants T. fulfilled the specified condition. In an action by the plaintiff claiming a declaration that she had the sole right to perform the work by means of cinematograph films:—

Held, that the entire performing rights in the play became vested in the defendants T. by virtue of the agreement, and when the Copyright Act 1911 came into operation the rights so vested included the right to the cinematograph reproduction of the play; and therefore the plaintiff's action failed.

THE plaintiff was the Baroness Orczy in her own right and the wife of the defendant Montague McLean Barstow. She was the authoress of and sole owner of the copyright in a novel entitled "The Scarlet Pimpernel." In 1903 the plaintiff, in collaboration with her husband as joint author, wrote a play in four acts under the same name of "The Scarlet Pimpernel," the play being founded entirely on the story told in the novel.

By an agreement in writing dated June 10, 1903, made between the defendant Julia Emilie Terry (known as Julia Neilson) and her husband Frederick Terry of the one part, and the plaintiff and her husband of the other part, it was agreed that the said Julia Neilson and Frederick Terry as theatrical managers accept the right of production of the play in four acts entitled "The Scarlet Pimpernel," written

by Baroness Orczy and her husband, from the said parties last named as authors; and retain the right of production on the then forthcoming autumn tour; also production rights at a first-class West End London theatre for a term of two years from the date of signing of the agreement, on the following terms and conditions:—

1. That the managers pay to the authors on the signing of the agreement 100*l.* in advance of and recoverable from the fees due when the play should have been produced.

2. That if, within the term of two years the managers should not have produced the play for a run at a first-class West End London theatre, all rights in the play should revert absolutely to the authors, and the 100*l.* become their property inalienable as a forfeit.

3. "If the said managers produce the said play on their forthcoming autumn tour for a run at a first-class West End theatre within the said term of two years, the entire rights for the United Kingdom, the United States of America, and the Dominion of Canada in the said play become theirs inalienable, and they shall present it when and where they will within the countries aforesaid, paying to the said authors fees on the following scale: West End of London, suburban and all other theatres in the United Kingdom, United States of America, and the Dominion of Canada, 5 per cent. on the gross weekly takings."

4. "In the event of the disposal by the said managers with the written approval of the said authors of the said rights, or certain of the said rights, all proceeds whether by way of sale or royalty shall be equally divided amongst the said parties to this agreement."

The defendants Terry fulfilled the conditions of production and became entitled to the entire rights granted by the said agreement. Except by this agreement the plaintiff and her husband had never granted to any other person any right or interest affecting the right of dramatising her novel, or making any cinematograph films of her said novel, or any part thereof, or to perform the same by means of cinematograph films.

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The plaintiff claimed that the cinematograph rights in the novel were vested solely in her as part of her copyright, and she was desirous of exploiting the same to her profit by entering into an agreement with some film producer. She alleged that the defendants Terry wrongfully and publicly claimed in effect by advertisement notices in the Kinematograph Weekly that they were entitled to the sole cinematograph rights in both the novel and the play. The plaintiff therefore by her action claimed a declaration that she was the owner of the sole right to make any cinematograph film by means of which the whole or any part of the work known as "The Scarlet Pimpernel" by the Baroness Orczy might be mechanically performed, and of the sole right to perform the said work, or any part of it, by means of such cinematograph film.

The defendants relied on the agreement of June 10, 1903, and claimed that they were entitled to the sole right to perform "The Scarlet Pimpernel" in public within the meaning of the Copyright Act, 1911, and in consequence thereof no exhibition of a cinematograph film of the said work could, except with their consent, be made within the area mentioned in the agreement. In para. 6 of their defence they set out a letter dated February 23, 1923, from their solicitors to the solicitors of the plaintiff (in answer to one of February 14, 1923, complaining of a notice in the Kinematograph Weekly), stating that the exhibition of a cinematograph film of "The Scarlet Pimpernel" would (in addition to being an infringement of their clients' rights) seriously damage the value of the play, and the production of an unsatisfactory film might well destroy that value entirely. They also said that if there was any objection on other grounds to the notice complained of they would be glad to consider it and if possible give effect to it. In reply the plaintiff's solicitors asserted that the defendants were not entitled to any cinematograph rights at all. The plaintiff's husband Montague McLean Barstow was made a defendant and was willing to submit to the order prayed by the statement of claim.

It appeared from the evidence of the plaintiff that "The

Scarlet Pimpernel" was originally composed in 1900 under the name of "The Red Carnation"; it was transposed from a story of the eighteenth century to a story of Russia in the twentieth century, and was published in serial form by the Daily Express in 1903 under the title of "The Sign of the Shamrock." The novel itself was first published in volume form on January 12, 1905, under the title of "The Scarlet Pimpernel" by Greening & Co., Ld. The original plot, construction, and incidents were maintained.

Maugham K.C. and *E. J. Macgillivray* for the plaintiff. The dramatic play of "The Scarlet Pimpernel" was entirely based on the novel of which the plaintiff was the sole authoress. Under the Dramatic Copyright Act, 1833, the author had the sole liberty of representing or causing the work to be represented at any place. The performing rights acquired under this statute had nothing therefore to do with cinematograph rights (which were then unknown) and were limited to stage rights. It was a personal licence to the defendants Terry as living persons to speak the words in a theatre. There was no intention to grant anything more: *Tate* v. *Fullbrook.* (1)

[They also referred to *Karno* v. *Pathé Frères, Ld.* (2); *Hales* v. *A. Treherne & Co., Ld.* and *Hales* v. *Fisher Unwin* (3); *Serra* v. *Famous Lasky Film Service, Ld.* (4)

Clauson K.C., *Luxmoore K.C.* and *A. Andrewes-Uthwatt*, for the defendants Terry. There is no claim by the defendants to make any cinematograph film, and that part of the plaintiff's claim for a declaration is wholly unnecessary. But the further claim of the "sole right to perform the said work, or any part of it," is disputed. The sole question is whether the plaintiff still has the right, notwithstanding the agreement of June 10, 1903, to produce the incidents in the play by means of a cinematograph film. The effect of that agreement is to give the defendants the entire right to

(1) [1908] 1 K. B. 821.
(2) (1908) 24 Times L. R. 588; (1909) 25 Times L. R. 242.
(3) Times Newspaper, Dec. 20, 1923 (not reported).
(4) [1921] W. N. 347; [1922] W. N. 44; Macgillivray's Copyright Cases, 1921, 272.

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produce the play in any form they please, including cinematograph form. It is part of their right of producing the play which they accepted from the plaintiff. But even if they did not get this particular right under the agreement they clearly get it under the Copyright Act of 1911, ss. 1, sub-s. 2; 24, 35. These sections substantiate our claim to the sole right to perform in any form we choose. The suggestions on the part of the plaintiff that the right granted was a mere personal licence to the defendants to produce the play during their joint lives is not borne out by the words of the agreement as a whole; it is much wider. The plaintiff's action therefore fails altogether.

W. P. Spens for the defendant M. M. Barstow.

Maugham K.C. in reply. The agreement only conferred the "acting rights" in the play on the defendants Terry as theatrical managers, that is for being acted in theatres; and the scale of fees stated in the agreement makes that clear.

EVE J. The point raised in this case is a short one, but it involves a matter of some consequence to the parties—namely, the ownership of the film rights in a successful play entitled "The Scarlet Pimpernel." The play, written by the plaintiff and her husband, is the dramatised version of a novel of the same name of which the plaintiff was the sole authoress. On June 10, 1903, the plaintiff and her husband entered into an agreement with Mr. and Mrs. Terry, and on the construction of that agreement the point now in issue falls to be determined. It is conceded that some rights of producing the play were thereby made over to Mr. and Mrs. Terry, but the nature of these rights and in particular their extent is in dispute. The defendants claim that the entire rights of producing the play thereby became vested in them; the plaintiff, on the other hand, maintains that the defendants acquired no rights of production beyond those incidental to performances by actors and actresses on the stage, in other words, what have been called the acting or stage rights, and that is the difference between the parties. For the solution of the problem thus raised recourse must be had to the terms of the agreement.

It is made between Mr. and Mrs. Terry of the one part and the plaintiff and her husband of the other part, and the Terrys as theatrical managers thereby accept and retain the right of production of the play on their then forthcoming autumn tour, and at a first-class West End London theatre, for a term of two years from June 10, 1903; for this they are to pay to the authors on the signing of the agreement the sum of 100*l.*, to be treated as on account of the fees which it was obviously contemplated would become payable if the play was produced in accordance with that part of the agreement with which I have already dealt. There is no express provision for the payment of any fees during those two years; but I think the inference is irresistible from the language of cl. 1 of the agreement that the parties contemplated that the same fees would be payable to the authors during that period as would become payable to them if the period was subsequently enlarged under the later clauses in the agreement. By cl. 2 it was provided that if within the two years the Terrys should not have produced the play for a run at a first-class West End theatre, the arrangement should come to an end, the authors retaining the 100*l.* and such rights as had been vested in the Terrys being revested in them. So far, it is obvious that the agreement merely conferred on the Terrys a limited right of production—a right to produce the play on an autumn tour, and for a period of two years at a first-class West End theatre. The agreement then goes on to provide what is to happen if the Terrys do produce the play at a first-class West End theatre.

In approaching the construction of the rest of the document it is to be borne in mind that the Terrys, if they carried out this agreement, were introducing this play to the public and were procuring the performance of it for a considerable period of time, a course which would, of necessity, involve them in serious liabilities and much expenditure, and which might, and I believe I am right in saying, happily did, result in the play becoming a very popular and well-known play. But the reverse might have been the case, and it must therefore be appreciated that the Terrys, if they undertook those

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liabilities and ran those risks, would look for some further remuneration, and further advantages in respect of the play when success was assured. Clause 3 was undoubtedly intended largely to increase their interest in the production. It provides that if they carry out the earlier part of the agreement, the entire rights for the United Kingdom, the United States of America, and the Dominion of Canada in the play were to become theirs inalienable. Pausing there I think it would be impossible to say that the language meant anything else than that the Terrys were to have the entire rights of production in the countries named, and that those rights were to be vested in them absolutely. The word "inalienable" which appears also in cl. 2 of the agreement is an inappropriate term, but I think it means irrevocably.

So far as I have read cl. 3 it appears to me to be a clause under which on fulfilment of the condition the Terrys were to acquire the entire performing rights of the play. It is said that this construction is qualified by the words which follow. The language again is unfortunate. I doubt whether the word "shall" in the next sentence was intended to be used in a mandatory sense, but I must take it as it stands. The sentence reads: "And they"—that is the Terrys—"shall present it when and where they will within the countries aforesaid." What does that mean? I think it was intended to free the Terrys from the restriction imposed in the earlier part of the agreement under which they were bound to produce their play at a first-class West End London theatre, and that the parties contemplated and intended that as soon as the Terrys became entitled to the entire rights, the selection of the places where this play should be produced was to rest with them. The authors were to have no continuing control, and the Terrys were not to be bound to present this at one location and in one class of theatre only. I do not think I ought to construe that word "shall" as imposing any obligation on the Terrys, and I adopt the view that the clause is an enabling and not a restrictive one. The provision for paying fees to the authors follows. [His Lordship read the provision.] It is difficult to see why they introduced all those

words. The contract was that they were to pay 5 per cent. on the gross takings wherever the play was produced. The provisions for the payment of the royalties do not really assist either party. Then comes cl. 4, a clause on which the plaintiff has relied, which provides for the possible disposal by the Terrys of the rights which they are given or any part of them, and for what is to happen in that case. I will assume that the clause qualifies the right of disposal to this extent, that it cannot be exercised without the written approval of the authors. I agree it is not inconsistent with the view that the Terrys were only to acquire the acting rights, but on the other hand it is at least as consistent with the alternative view that the whole performing rights were vested in them and that they might, if they were so minded and the authors did not object, transfer to any person the whole or any part of those rights. In either case it is obvious that the presentation of the play or the exercise of the right after an assignment would be by the purchaser and not by the Terrys, a result which discounts the argument on the part of the plaintiff that she never intended the play to be produced by any one else than the Terrys. The position then was this. The authors having conceded these further rights first imposed the restriction on the exercise of the right to dispose of them and secondly stipulated that they should have one half of the consideration received on any sale, and the draftsman has so provided. That seems to me the effect of cl. 4, and on the whole I think its purport and wording, are more consistent with the Terrys having acquired the whole of the rights than with their still having only a part of them. By the first part of cl. 3 the entire rights were in my opinion vested in Mr. and Mrs. Terry ; and there is nothing in the later part of that clause or in cl. 4 to cut down or qualify the grant. When the Copyright Act of 1911 came into operation on July 1, 1912, the rights so vested included the right to the cinema reproduction of the play. So far, therefore, as the action seeks a declaration that the plaintiff is entitled to the sole right of filming this play, I think it fails.

Another argument which I have had some difficulty in

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following was based on the assertion that although the plaintiff is the sole owner of the copyright of the book, and that so far as the book is concerned the defendants have no greater interest in it than naturally flows from the fact that a good deal of the book is introduced into the play by way of dialogue, the defendants, by their advertisements and otherwise, have attacked the plaintiff's copyright as authoress of the book. I do not take that view. I think that the defendants throughout did intend to limit and, fairly construed, their advertisements did indicate that they limited their claim to the particular rights with which I have been dealing. I think the letter which they wrote at a very early stage of the dispute was a wise and courteous invitation to the plaintiff to define her objection to their advertisements, and as she did not see fit to respond to that invitation, it is a little late in the day to raise this objection at the hearing. The action does not involve in any way the rights of the plaintiff as the authoress of the book, and no one is assailing her copyright therein. The sole question is whether she has a right to reproduce this play in a cinema film, or the right to do so has been parted with by her to the defendants. Upon that I have come to the conclusion that the defendants are right and that the plaintiff is wrong. In these circumstances, I have no alternative but to dismiss the action with costs.

Solicitors: *Field, Roscoe & Co.; Guedalla, Jacobson & Spyer.*

G. M.

In re SEARLE, HOARE AND COMPANY.

LAWRENCE J.

1924

June 2.

[149 of 1922.]

Bankruptcy—Proof—Admission by Trustee—Reduction of Proof—Overpayment—Adjustment—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *Sch. II.*, *r.* 24—*Bankruptcy Rules*, 1915, *r.* 387.

Where, after the admission by the trustee of a creditor's proof against a bankrupt's estate and that creditor's participation in a first dividend, it was ascertained that he had proved for and received more than he was entitled to, and upon an application to the Court his proof was reduced :—

Held, that in the absence of any rule in bankruptcy, the well-known principle of equity, that a beneficiary who has been overpaid is not entitled to receive any further payment out of the common fund, until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary, was applicable, with the result that the overpaid creditor is not entitled to participate in any future dividends in respect of his reduced proof without giving credit for the overpayment in respect of his original proof.

The mere fact that the trustee cannot recover either payments made to a creditor whose proof is subsequently expunged or overpayments made to a creditor whose proof is subsequently reduced does not prevent the operation of that equitable principle in the case of a proof in bankruptcy. Nor does the judgment of Jessel M.R. in *Ex parte Harper* (1882) 21 Ch. D. 537, 541 contain any statement inconsistent with that application of the principle.

MOTION.

Messrs. Searle, Hoare & Co., who carried on the business of jewellers and silversmiths in the City of London, became indebted in the course of their business to Messrs. Paton, Mege and Warwick for goods sold and delivered. On February 14, 1921, Messrs. Paton & Co. assigned the debt, for value received, to the respondent Mr. Henry Harris Lloyd, who on July 13, 1921, as assignee of the debt, commenced an action in the King's Bench Division against the debtors, and on November 11, 1921, recovered judgment therein for the sum of 1494*l.* 19*s.* 6*d.* and costs.

On March 9, 1922, a receiving order was made against the debtors, and on March 27, 1922, the debtors were adjudicated bankrupt, and the appellant was duly appointed trustee.

On March 17, 1922, the respondent proved in the bankruptcy for 1171*l.* 2*s.* 6*d.*, being the balance alleged by

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him to be then remaining due in respect of the judgment debt, after giving credit for certain sums paid to him since the judgment; on June 2, 1922, his proof was admitted by the trustee for that amount, and the respondent was subsequently paid the sum of 146*l.* 7*s.* 10*d.*, being the amount of a first dividend of 2*s.* 6*d.* in the pound in respect of 1171*l.* 2*s.* 6*d.* It was subsequently discovered by the trustee in the course of his investigation of the bankrupt's affairs that in consequence of payments made to the respondent since the assignment of the debt to him the amount due to him in respect thereof at the time when he obtained judgment was 1218*l.* 12*s.* only, and that, in consequence of further payments since the judgment, the amount due to the respondent at the date of the receiving order was reduced to 880*l.* 5*s.* 8*d.* The trustee therefore applied to the Court by motion for an order that the respondent's proof, which had been admitted for 1171*l.* 2*s.* 6*d.* should be reduced to 880*l.* 5*s.* 8*d.*, and for a declaration that the respondent was entitled to dividend in respect of the reduced amount only, and that the trustee should be at liberty to set off the amount overpaid against any future dividend payable to the respondent.

On March 17, 1924, an order was made referring the matter to the registrar to ascertain (inter alia) for what amount the respondent's proof ought to have been admitted, and in pursuance of that order the registrar reported on May 7, 1924, that, after taking into account all sums paid since the assignment of the debt to the respondent and the date of the judgment respectively, the respondent's proof ought to have been admitted for the sum of 880*l.* 5*s.* 8*d.*, with the result that the respondent was shown to have been overpaid a sum of 36*l.* 7*s.* 2*d.* on the distribution of the first dividend.

Consequent upon that report the motion came on again for hearing, when it was not disputed that the trustee was entitled to reduce the respondent's proof to 880*l.* 5*s.* 8*d.*

G. Wightman Powers for the trustee. The trustee is entitled to set off the overpayment against the respondent's share

in any future dividend declared in the bankruptcy in respect of the reduced amount of his proof.

Hansell for the respondent. A creditor who has been overpaid by the trustee is under no liability to refund either in cash or by way of set-off. The effect of r. 387 of the Bankruptcy Rules, 1915, is to bring into play the principle of the decision in *Ex parte Harper*. (1) I rely upon a statement of Jessel M.R. in that case: "And no injustice can be done, because any dividends which have been already paid are allowed to be retained by the creditor, and the expunging affects only the right to receive future dividends," from which it appears that whether the trustee is moving to expunge or reduce the proof, the creditor is under no liability to account for what he has already been paid; he is not bound to have the overpayment adjusted.

LAWRENCE J. This motion raises a short point which, in my opinion, presents no serious difficulty. The facts are as follows: [His Lordship then stated the facts and continued:] In these circumstances it is not disputed that the respondent's proof must be reduced to 880*l.* 5*s.* 8*d.* Mr. Hansell, however, contended that the respondent is entitled to receive the full amount of any future dividends which may be declared in respect of his reduced proof without being under any obligation to return or to give credit for the sum overpaid to him on July 19, 1922, in respect of his original proof, and *Ex parte Harper* (1) was cited in support of this contention. In that case the question was whether the inspectors under a deed of inspectorship were entitled to have the proof of a creditor expunged. The Court of Appeal, on the assumption that the proof had in fact been admitted (a question upon which the Court expressed no opinion), held that the proof ought to be expunged, and Jessel M.R. in the course of his judgment, when dealing with the contention that the creditor might have altered his position on the faith of proof having been admitted, said: "And no injustice can be done, because any dividends which have been already paid are allowed to be retained by the

(1) (1882) 21 Ch. D. 537, 541.

LAWRENCE J. 1924 SEARLE, HOARE & CO., *In re.*

creditor, and the expunging affects only the right to receive future dividends." Mr. Hansell argued that from this statement it was to be implied that, where only a part of the proof was expunged and in fact the proof was merely reduced, the creditor was entitled to receive the full amount of the future dividends on the reduced proof without having to give credit against such future dividends for any excess of dividend received in respect of the original proof. I do not think that this argument can be supported. In my judgment, there is nothing in the statement of Jessel M.R. which warrants the proposition that, where there is a common fund which is being administered for the equal benefit of all the creditors, a creditor who has been paid out of that fund more than was due to him is entitled to receive further moneys out of the fund without first giving credit for the overpayment. The mere fact that the trustee cannot recover either payments made to a person whose proof is subsequently expunged or overpayments made to a creditor whose proof is subsequently reduced does not, in my opinion, prevent the operation of the well-known principle of equity that a beneficiary who has been overpaid is not entitled to receive any further payment out of the trust fund until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary—a principle which, in my opinion, is applicable to the facts of the present case.

In the result I propose to make an order that the respondent's proof be reduced to 880*l.* 5*s.* 8*d.*, and to declare that the trustee is entitled to set off the sum of 36*l.* 7*s.* 2*d.* being the amount overpaid, against any future dividend payable to the respondent.

In the special circumstances I think that the proper order to make as to the costs of this motion is, that the trustee's costs (including his costs of the inquiry before the registrar) be paid out of the estate and that the respondent bear and pay his own costs.

Solicitors for the applicants: *Phillips, Son & Rollinson.*
Solicitors for the respondent: *Lloyd & Co.*

H. C. H.

JACOBS *v.* BATAVIA AND GENERAL PLANTATIONS TRUST, LIMITED.

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[1923. J. 1972.]

Contract—Company—Contract contained in Two written Instruments—Prospectus—Promise in Prospectus—Deposit Notes—Collateral Contract.

The plaintiff, in reliance upon a prospectus issued in September, 1920, by the defendant company (hereinafter called " the Trust "), applied for and had allotted to him subject to the terms of the prospectus four 100*l.* 7½ per cent. profit sharing deposit notes of the Trust. It was stated in the prospectus that the notes would be paid off at 105 per cent. by four annual drawings, and, under the heading " Earlier payments," that the Trust retained the right to pay off at 105 per cent. all or any of the outstanding notes at any time on giving three months' previous notice in writing, but that in the event of the sale of the Trust's R. B. estates, further referred to in that prospectus (which according to the construction placed upon the prospectus by the Court was not confined to a sale under a certain option of purchase referred to later in the prospectus, but included a sale to anybody whomsoever), the Trust would set aside out of the proceeds of sale a sum sufficient to redeem all the notes then outstanding, and the holders would be given an option of being then paid off in cash at 105 per cent. or of retaining their notes till the date of drawing. Each of the notes, which was in the form of the specimen note referred to in the prospectus, provided that the Trust would, as and when the principal sum of 100*l.* became payable in accordance with the conditions indorsed thereon, pay to the plaintiff the sum of 105*l.*, and was expressed to be subject to and with the benefit of those conditions, which repeated the provisions contained in the prospectus for the redemption of the notes by drawings and the option retained by the Trust to pay off the notes on notice, but did not refer to the promise by the Trust contained in the prospectus as to earlier payment in the event of the sale of the Trust's R. B. estates.

The option to purchase referred to in the prospectus having lapsed and the Trust having contracted to sell the R. B. estates without having given notice to the plaintiff that his option to be paid off or to retain his notes had thereby become exercisable, and the Trust having repudiated their liability to perform their promise contained in the prospectus, the plaintiff brought this action to have the said liability of the Trust established and for an injunction to restrain them from dealing with the proceeds of sale without in the first place setting aside a sum sufficient to pay off the outstanding notes :—

Held, by the Court of Appeal, affirming the decision of Lawrence J. [1924] 1 Ch. 287, that the plaintiff was entitled to the relief claimed on either of two grounds—namely, (1.) that the entire contract was contained in two written instruments—namely, the deposit notes and the prospectus—the terms of which the Court could reconcile by

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construing the promise in the prospectus as if it were inserted in the note as a proviso to come into operation, if and when the R. B. estates were sold, or (2.) that the promise was a binding collateral contract, the consideration for which was the contract by the plaintiff to take up the notes, and that, as the terms of that promise and an animus contrahendi on the part of the plaintiff and the Trust had been clearly proved, the test laid down by Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A. C. 30, 47 was satisfied.

In re Tewkesbury Gas Co. [1911] 2 Ch. 279; [1912] 1 Ch. 1; *British Equitable Assurance Co.* v. *Baily* [1906] A. C. 35; and *In re Chicago and North-West Granaries Co.* [1898] 1 Ch. 263 distinguished.

APPEAL from the decision of Lawrence J. (1)

The facts are fully stated in the report of the case in the Court below. For the purposes of the present report they are sufficiently set out in the headnote.

The action was brought by the plaintiff for a declaration that the defendant Trust was bound to set aside, out of the proceeds of sale of certain property belonging to the Trust, a sum sufficient to pay off at 105 per cent. certain outstanding deposit notes which had been issued to the plaintiff by the Trust on the terms of a prospectus containing a promise that in the event of the sale of the property in question a sum should be set aside out of the proceeds sufficient to pay off the outstanding deposit notes. The plaintiff also claimed an injunction restraining the Trust from applying the proceeds of sale otherwise than in accordance with the promise contained in the prospectus.

Lawrence J. gave judgment for the plaintiff, and the defendants appealed.

Schiller K.C. and *Heckscher* for the appellants. Prima facie the contract is contained in the deposit note itself. The prospectus forms no part of the contract. The statements contained in it cannot be referred to for the purpose of interpreting the contract contained in the deposit note: *In re Tewkesbury Gas Co.* (2); *British Equitable Assurance Co.* v. *Baily.* (3)

In *In re Chicago and North-West Granaries Co.* (4) North J.

(1) [1924] 1 Ch. 287.
(2) [1911] 2 Ch. 279; [1912] 1 Ch. 1.
(3) [1906] A. C. 35.
(4) [1898] 1 Ch. 263.

held that a prospectus could not be looked at in order to construe a debenture.

In *New London Credit Syndicate* v. *Neale* (1) it was held that evidence of a contemporaneous oral agreement to renew a bill of exchange was inadmissible, on the ground that its effect would be to contradict the terms of a written instrument.

Collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties must be clearly shown: *Heilbut, Symons & Co.* v. *Buckleton.* (2)

Jenkins K.C. and *Cecil Turner* for the respondent were not called upon to argue.

POLLOCK M.R. This appeal must be dismissed. I agree with the judgment of the learned judge in regard to the first ground upon which he granted the plaintiff relief, and that ground seems to me so simple and so clear that it is unnecessary to go into the second ground of his judgment, in which he found that there was a collateral contract between the parties. I think it better to point out how clearly it appears to me that there was a definite contract between the parties sufficient to justify the relief which the plaintiff will be granted in the order which we propose to make. The case is really quite simple. The defendant company issued a prospectus in September, 1920, inviting subscriptions to an issue of 100,000*l.* 7½ per cent. deposit notes, upon terms stated in the deposit note, to which I will presently refer. Accompanying that prospectus was a form of application. The plaintiff being minded to take some of the deposit notes, and relying, as the learned judge finds in fact he did, upon the terms of the deposit notes, made his application for the notes upon the form which he had received with the prospectus. The application was in these terms: "Gentlemen, having paid to your bankers the sum of 100*l.* being 25 per

(1) [1898] 2 Q. B. 487. (2) [1913] A. C. 30, 47.

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cent. on 400*l.* deposit notes now offered for subscription at par, I hereby agree to accept the same or such lesser quantity (if any) as may be allotted to me, subject to the terms of the prospectus and of your memorandum and articles of association, and I undertake to pay the further amounts as they become due according to the terms of the issue." It is quite plain from those words that the offer, or the proposal, made in the application form to the company was based in definite terms upon the conditions set out in the prospectus. In response to that the company sent the following allotment letter: "We beg to inform you that in accordance with your application the directors have allotted to you 400*l.* profit sharing deposit notes forming part of the issue of 100,000 of such profit sharing deposit notes offered for subscription at par." "Offered for subscription at par." What does that mean? They were offered for subscription at par by the prospectus which had been issued to the public. The simplest way to deal with the case is this. It is quite plain that in the application form which was intended to be put forward, the plaintiff himself asks for those deposit notes to be allotted to him subject to the terms of the prospectus, and the directors in reply definitely say that they do allot to him 400*l.*, forming part of the issue of the deposit notes which were offered for subscription by the terms of the prospectus. One of these terms is: "The Trust retains the right to pay off at 105 per cent. any or all the outstanding notes at any time on giving three months' previous notice in writing, but in the event of the sale of the Rio Bravo estates (further referred to in this prospectus) the directors will set aside out of the proceeds of such sale a sum sufficient to redeem all the notes then outstanding, and will give the holders the option of being then paid off in cash at 105 per cent., or of retaining their notes till the date of drawing." What do those words "further referred to in this prospectus" mean? There are two further references to the Rio Bravo estates of 320,000 acres, stated to be one of the four large assets of the company, and to be worth 150,000*l.*, and there is another statement that there was in existence at that time an option

which had been granted to an American financial group, who had such confidence and belief in the Rio Bravo estates that they had taken an option to purchase at a sum which was equivalent to 280,000*l.*; and, as the prospectus says, showing an excess of 130,000*l.* over the directors' valuation. In other words, it seems to me that the actual facts are vouched to show (1.) that the Rio Bravo estates were a valuable asset, and (2.) that the estimate of their value as set out in a previous paragraph of the prospectus was in truth a conservative valuation, as it is stated to be. As the learned judge points out, there is no specific attribution of these words—" referred to in the prospectus "—to either the one reference to the Rio Bravo estates or to the other, and one would expect, if there had been any intention to confine that reference to the particular sale contemplated under the option, there would have been a statement making it clear that such was the meaning. I agree with the learned judge, who says : " If the intention had been to confine the promise to the event of that particular option being exercised, I should have expected to find that the natural and correct way of expressing such intention would have been adopted, and that the promise would have been made conditional upon a sale of the Rio Bravo estates effected in pursuance of the option to purchase thereinafter referred to." I think the learned judge's construction of the passage is quite right, and therefore that the defendants have definitely contracted with the plaintiff, in respect of 400*l.* deposit notes allotted to him, that the directors will set aside out of the proceeds of sale of the Rio Bravo estates a sum sufficient to redeem all the notes then outstanding, and that they are to give the holders an option. The plaintiff exercised his option, and he is entitled therefore to be paid out of the proceeds of these Rio Bravo estates. As a matter of fact, I understand some sales of part of the Rio Bravo estates have taken place, and certain moneys have been received. Those moneys therefore must, in accordance with the contract between the parties, be held for the purpose of paying out of these proceeds of the sale a sum sufficient to

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redeem the notes which the plaintiff put in suit. I do not agree with the view presented to us that some modification of the contract has been made by the terms of the deposit note itself. It seems to me quite clear, particularly because the deposit note was then in existence and, as the last paragraph of the prospectus shows, a specimen of it with the conditions attached could be seen at the office of the Trust. It was not intended that the contract should be contained only in the deposit note. It seems clear from the words I have quoted of the application for the 400*l.* deposit notes and the allotment letter, that the terms of the prospectus were to be looked at and were the terms and conditions which formed the basis of the contract. The deposit note was not intended to constitute a merger or an alteration of the contract between the parties. I do not think that *In re Chicago and North-West Granaries Co.* (1), before North J., or *British Equitable Assurance Co.* v. *Baily* (2) governs the present decision. It seems to me in the latter case it was a mere question of construction. The law, as laid down by the Court of Appeal, was not modified or altered by the decision of the House of Lords, and it stands; and as far as the decision stands it is definitely against the appellant in this case, because it declares that a company cannot, by altering its articles, justify a breach of contract. What the House of Lords held was that upon the actual facts of that case there never was a contract at all, but they did not say a single word to modify or contradict the law which had been laid down by the Court of Appeal. I think, therefore, that there was a contract, and upon its true interpretation the plaintiff is entitled to rely upon this source for the payment of his deposit notes, and that he has exercised the option which has been given to him, and there is no modification of the contract by virtue of the deposit note. He is, therefore, entitled to succeed in the action. That was the main point which was put before Lawrence J., and it was the main point which was argued here. There appears to be a little doubt whether the actual

(1) [1898] 1 Ch. 263. (2) [1906] A. C. 35.

form of the order made by Lawrence J. was correct. I doubt whether he had anything like the full argument which we have had in this Court; and although we are prepared to modify it so as to make the relief given to the plaintiff apply to the 400*l.*, other considerations may apply as to the notes which he obtained by transfer from other persons. That, however, is not the substantial point of the appeal, and I therefore think that the appeal ought to be dismissed, and, as the respondent has substantially won, with costs. The order agreed upon by the Court will be read by Warrington L.J.

WARRINGTON L.J. stated the facts and continued: It is common ground that the deposit note itself, while providing for the drawings, and providing for conversion into shares, makes no allusion at all to the stipulation referred to in the prospectus with regard to the possible sale of the Rio Bravo estates. In my opinion, the case is really very simple. The contract may be stated in this way: the terms of the deposit note have already been settled. An applicant for a deposit note in those terms which have already been settled, if the deposit note is allotted to him, shall be entitled to the benefits which have been stipulated for by the prospectus; that is it is an independent contract, it does not vary the terms of the deposit note; it is an independent obligation, to the benefit of which the holders of every deposit note in that particular form shall be entitled, an additional benefit given to each holder of the deposit note. I think it complies exactly with the conditions stated by Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* (1), that what the plaintiff has established is a contract collateral to the main contract to take the deposit note. He says: "It is evident both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds' is in every sense of the word a complete legal contract. It is collateral to the main

(1) [1913] A. C. 47.

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contract, but each has an independent existence, and they do not suffer in respect of their possessing to the full the character and status of a contract." Now in effect the Trust, by the issue of this prospectus, and by accepting the application for the deposit note on the terms of the prospectus, says to the applicant: "If you take this deposit note and pay us the money secured by it we will give you the benefit mentioned in the prospectus in addition to such benefits as you may have under the deposit note itself." In point of law I can see no objection to such a contract, and in point of fact that that contract was made was abundantly clear. Lord Moulton goes on to say, as one would have expected, that such contracts are rare, but when they do happen they must be sufficiently proved, and care must be taken to see that they are sufficiently proved. In the present case there is no question of proof by parol evidence. We have sufficient evidence in support of the contract in writing, and if there were any doubt as to the animus contrahendi as far as the company itself is concerned, such doubt would be entirely removed by the resolution of September 22, 1920, which is referred to in the prospectus, and in the deposit note, as one of the resolutions forming the authority of its issue. It seems to me, therefore, that the plaintiff has, so far as the 400*l.* originally issued to him is concerned, established the contract which he seeks to establish. Then it is said: "True, he has established the contract stated in the prospectus, but, according to the true construction of the statements made in the prospectus, the benefit which was thereby stipulated for was confined to the event of the Rio Bravo estates being sold under the terms of an option, referred to in the subsequent paragraphs of the prospectus." That is merely a question of construction of the statements contained in the prospectus, and the statement I have already read I will read again for this purpose: "In the event of a sale of the Rio Bravo estates (further referred to in this prospectus) the directors will do so and so." The question is, according to the ordinary grammatical construction of these words, is the sale of the Rio Bravo estates that which is

further referred to in the prospectus, or is it the Rio Bravo estates which are further referred to? In my opinion, the further reference is to the Rio Bravo estates, and therefore the stipulation becomes effective on a sale of the Rio Bravo estates, though it be not the sale which was contemplated on the day the prospectus was prepared and issued.

I think, therefore, the appeal fails, but after discussion we have all come to the conclusion that the actual terms of the order ought to be different from those in which the judgment has been drawn up, and for one reason in particular, and that is that besides the 400*l.* which the plaintiff applied for, he purchased from other persons additional deposit notes to the amount of 600*l.* With regard to those he has not proved the independent contract which he has proved in the case of the 400*l.* notes, because it may be that the original applicants for those 600*l.* worth of notes, or some of them, may not have made this special collateral contract with the company; that is to say, they may not have purchased upon the terms of the prospectus, or they may, as between themselves and the company, be subject to some equity which would prevent the enforcement of them, and the plaintiff, having bought notes from such people, would not necessarily be entitled to the benefit of this collateral agreement. The order which we propose to make will be in these terms: "Declare that the plaintiff, as the holder of the deposit notes for 400*l.* originally allotted to him, became entitled on the sale of the Rio Bravo estates, in the pleadings mentioned, to the option of being paid the sum of 420*l.* in cash, and, having exercised such option, became and is entitled to be paid such sum, together with the interest payable in respect of the said deposit notes; and is also entitled to the benefit of the agreement by the company to set aside out of the proceeds of the sale a sum sufficient to redeem the notes outstanding at the date of the sale. Let the defendants pay to the plaintiff the said sum of 420*l.* with interest as aforesaid, and unless and until payment shall be made, there will be an injunction restraining the defendants from applying the proceeds of sale otherwise than by setting aside and

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applying a sum sufficient for the purpose aforesaid. This order will be without prejudice to the plaintiff's rights (if any) in respect of the further notes for 600*l.* acquired by him." In my judgment, the appeal ought to be dismissed and the respondent ought to have the costs of the appeal.

SARGANT L.J. Everything turns here on the meaning and effect of the short paragraph headed "Earlier Payments" in the prospectus. The first question is one of construction, and with regard to that I need say little. I am clearly of opinion that the words "further referred to in this prospectus" are to be applied, according to their ordinary grammatical position and effect, to the substantives "Rio Bravo estates," and not to the substantive "sale," and that the clause in question applies to a sale at any time of the Rio Bravo estates, and not merely to a sale of the estates under the option which is mentioned later on in the prospectus. Then with regard to the effect of that statement: Is that intended to be and does it operate as a collateral bargain, additional to, and independent of, the rights given by the deposit notes or debentures, or is it a representation as to what the contents and effect of the deposit notes are going to be? The contents and the effect of the deposit notes had been already settled, and the deposit notes could be inspected by applicants, and these notes contained nothing whatever with regard to the matter dealt with by the paragraph. In my judgment, this is as plain a case of an additional or collateral contract as it would be possible to find. It does not depend on oral evidence; it is there stated in the print. Unless this were so, the result would be that this definite statement in the prospectus would give no legal right whatever to the persons who applied under the prospectus; for, inasmuch as it cannot be a representation as to the contents of the notes, there is no misstatement or misrepresentation and therefore no possibility of rectification or of any right of that sort to be enforced by the applicant; and I cannot think that this deliberate statement was not intended to have a definite legal result. Therefore, as regards

the four deposit notes originally applied for and allotted to the plaintiff, it seems to me that he is entitled to succeed. On the other hand, with regard to the other six deposit notes, for 600*l.*, I do not think he has shown a title, and that because, in addition to the reasons mentioned by Warrington L.J., he does not show any separate assignment to him by the original allottees of any separate collateral contract to which they may have become entitled. I agree, therefore, with the judgments which have been pronounced, though as to costs I should have felt inclined not to give any costs of the appeal, inasmuch as the appellants have succeeded in reducing the effective claim from 1000*l.* to 400*l.*

Appeal dismissed.

Solicitors for the appellants: *Reid Sharman & Co.*
Solicitors for the respondent: *Jenkins, Baker & Co.*

G. A. S.

In re NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED.

[00375 of 1922.]

Company—Life Assurance—Winding Up—Policy mortgaged to Company—Estimated Value of Policy—Mutual Credits—Set-off—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 31.

A policy holder in a life assurance company borrowed money from the company on his policy. Before the death of the assured the company was wound up, and the policy was valued under the Assurance Companies Act, 1909. The policy holder claimed to set off the value of the policy against his debt:—

Held, that s. 31 of the Bankruptcy Act, 1914, applied, there having been at the date of the winding up contractual obligations the breach of which might give rise to a claim for damages provable in the winding up, and that the policy holder was entitled to set off the value of his policy against his debt.

Ex parte Price (1875) L. R. 10 Ch. 648 distinguished.

THIS was a summons taken out by the liquidator of the company for the determination of certain questions arising

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in the winding up of the company. The company was ordered to be wound up compulsorily by the Court on July 25, 1922, on a petition presented on July 11. Upon the making of that order the policies fell to be valued in the manner prescribed by Sch. 6 to the Assurance Companies Act, 1909, and the claim of each policy holder provable in the winding up was ascertained and fixed at the amount of the valuation so made. The liabilities of the company were considerable, and it was reasonably certain that the claims of the life policy holders would not be paid in full. In these circumstances the question was now raised whether, in ascertaining the sum payable to the company by a policy holder whose mortgage debt was still outstanding at the date of the liquidation, he ought to be credited with the amount at which the policy had been valued or with the dividend ultimately payable thereon, and this fell to be argued on behalf of P. W. Potter, a respondent appointed to represent the class of life policy holders who had assigned their policies to the company by way of mortgage for securing advances made to them by the company.

Bennett K.C. and *Gavin Simonds K.C.* for the liquidator.

Archer K.C. and *Spens* for the respondent, Potter. In *Paddy* v. *Clutton* (1) Russell J. felt himself bound by the decision in *Ex parte Price* (2), but that case is clearly distinguishable from *Paddy* v. *Clutton* (1) and the present case.

On principle it is difficult to see why the mutual credits section—s. 31 of the Bankruptcy Act, 1914—combined with s. 17 and Sch. 6 (A) of the Assurance Companies Act, 1909, is not applicable. It is true that the sum assured is not due, but the company by its own act in repudiating the contract —that is, by going into liquidation—brings into existence an immediate right to damages or compensation. That claim and the claim to the mortgage money should be set against each other: *Lee and Chapman's Case* (3) and *In re Daintrey.* (4) There is nothing in *Ex parte Price* (2) to conflict

(1) [1920] 2 Ch. 554.
(2) L. R. 10 Ch. 648.
(3) (1885) 30 Ch. D. 216.
(4) [1900] 1 Q. B. 546.

with this argument. In that case not only was there no mutual credits section available, but the question was whether proof could be set against proof in liquidation, and the wording of the private Act of Parliament there in question was quite different from the wording in the statutory provisions applicable in the present case. In *Ex parte Price* (1) the policy holder could not give himself a present right by allowing himself to be made a bankrupt.

James L.J. recognizes (2) that there was no right of set-off under the Companies Acts as then existing.

G. B. Hurst K.C. and *Stamp* for holders of investment bonds mortgaged to the company. The investment bond holders are entitled to set off against their debts the present actuarial value of the amount covenanted to be paid them. This case is entirely outside the decision in *Ex parte Price.* (1) In *Ex parte Price* (1) the policy holder never had a right to the amount found to be the actuarial value of his policy; he had merely a right to dividends on that amount. Even if *Paddy* v. *Clutton* (3) was rightly decided, its operation was expressly limited to current life policies only. Although the business of issuing investment bonds may be a class of life assurance business, the bonds themselves are not mere life policies and have to be valued by a different method. Accordingly the bondholders' claim to set off is governed by the general principle.

A. Grant K. C. and *J. A. Wolfe* for general policy holders. The decision in *Ex parte Price* (1) is right, but whether it is right or wrong this case is covered by it, and the Court is bound to follow it. The law of bankruptcy in 1875 was the same as it is now. The Assurance Companies Act, 1909, merely replaces the Life Assurance Companies Act, 1872. There can be no set-off in the case of an insurance policy, because the policy is not a debt. A right to set off could only exist if there were mutual credits at the date of the act of bankruptcy, and in the case of an insurance policy they are non-existent. At the date of the bankruptcy the claim against

(1) L. R. 10 Ch. 648. (2) L. R. 10 Ch. 648, 650.
(3) [1920] 2 Ch. 554.

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the mortgage had matured, but the claim against the policy had not. There cannot be set off when one debt is ascertained at the date of the bankruptcy, and the other is not. The Assurance Companies Act has special clauses, which take it out of the mutual credits section. The value of the policy is not a debt which can be taken into account: *Ex parte Price.* (1) There is no fact in this case to distinguish it from *Ex parte Price.* (2) The date for determining the valuation in an insurance case is the date of the winding-up order: *In re Law Car and General Insurance Corporation.* (3)

Spens in reply.

June 24. EVE J. The claimant, relying upon the mutual credits or mutual dealings section—s. 31 of the Bankruptcy Act, 1914, applicable in this winding up by virtue of s. 207 of the Companies (Consolidation) Act, 1908—insists that he ought to be credited with the full amount for which he is entitled to prove—that is to say, the value affixed to the policy. The liquidator, on the other hand, maintains that authority binding on this Court precludes the application of the mutual credits section to the case of the claimant and of the class of mortgagor policy holders which he has been selected to represent for the purposes of this discussion.

Apart from authority, the view put forward on behalf of the claimant would appear to be justified by the statutory provisions on which he relies. They are to be found in the Bankruptcy Act, 1914. By sub-ss. 3 and 8 of s. 30 of that Act the value put upon the policy is to be deemed to be a debt provable in the winding up. The amount of the mortgage debt owing to the company by the policy holder is not in dispute, and the result looks very like a position in which there are cross-demands or mutual debts. Such a position, it is argued, is precisely the one contemplated by s. 31, which provides that where there have been mutual debts or other mutual dealings between a bankrupt and any other person proving a debt under the receiving order "an account shall

(1) L. R. 10 Ch. 648, 651. (2) L. R. 10 Ch. 648.
(3) [1913] 2 Ch. 103.

be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

And for this argument support is to be found in the judgment of the Court of Appeal in *In re Daintrey* (1), where Lindley M.R., in holding that the trustee in Daintrey's bankruptcy was bound to allow the full amount of the debt owing by Daintrey to Messrs. Mant against the debt due from them to the estate, said (2): "How can the trustee insist upon having 20*s.* in the pound from Messrs. Mant, and say that Messrs. Mant must be content with a dividend on the debt due to them from Daintrey? Such a contention is, in my opinion, unarguable. It is to remedy such an injustice that the provisions of the old bankruptcy law have been recast, and the point has been dealt with by the mutual credit provisions of s. 38 of the Bankruptcy Act, 1883." In passing I may perhaps point out that the particular provisions with which this case is concerned do not materially differ in the Acts of 1869, 1883 and 1914.

Substituting the liquidator of the company for the trustee and the claimant for Messrs. Mant in the passage I have just read, the observations of the Lord Justice would appear to be not otherwise than apposite to the present case.

But, as has been pointed out on behalf of the liquidator and those opposing the claimant's contention, in *Daintrey's Case* (1) there was an existing debt due from the debtor at the date of the receiving order and the act of bankruptcy on which it was founded, whereas in the present case the claim did not come into existence until the winding-up order was made and the company thereby declared its inability to perform the contract—facts which indicate the grounds on which policy holders have been held liable in a winding up to pay premiums accruing due between the presentation of the petition and the making of the winding-up order. Is the operation of the mutual dealings section excluded by the

(1) [1900] 1 Q. B. 546. (2) [1900] 1 Q. B. 546, 572.

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distinction indicated between this case and *In re Daintrey* (1) ? I think not. *Lee and Chapman's Case* (2) is an authority to the contrary. There the dates were: December 9, 1882, petition; January 13, 1883, order to wind up; and May 25, 1883, notice requiring the company to maintain the streets for fifteen years, the giving of which was a condition precedent to the right to claim the damages which the Commissioners of Sewers were ultimately held entitled to set off against the debt owing by them to the liquidator. Brett M.R. puts it in this way (3): "As between them"—that is the Commissioners and the liquidator—"this claim to damages can be proved in the winding up. The moment I come to that conclusion, I must hold that the Bankruptcy Act, 1869, s. 39" (that was the mutual dealings section in that Act) "applies, and that the claim of the Commissioners is to be treated by way of set-off, and they are entitled to say that they cannot be called upon to pay more than the amount which they owed the company diminished by that which the liquidator owed them for these damages."

Cotton L.J. puts it even more pointedly. After stating the terms of the contract as to the company's liability to maintain if notice were given, he goes on (4): "Of course that breach"—that is breach of the agreement to maintain —"has not occurred actually, but the company has put itself in such a position that it cannot possibly perform the contract, and the Commissioners are entitled to prove, although the notice had not been given at the date of the liquidation or at the date of the completion of the work by the liquidator; in my opinion there is a claim for damages capable, as the Vice-Chancellor thought, of being proved in the winding up. The question is whether it does not come under the mutual credit clause: s. 39. In my opinion it does; mutual dealings in respect of which there are these cross-claims are capable of being proved in the liquidation as well as the other claim which the liquidator has as against the Commissioners. And why should it not be ? It is argued that this is not a liability

(1) [1900] 1 Q. B. 546.
(2) 30 Ch. D. 216.
(3) 30 Ch. D. 222.
(4) 30 Ch. D. 223.

at the time because there was no breach. At the time when the company commenced its liquidation, it was under a contract which implied a liability to maintain these streets if it were required. It is now rendered impossible by the winding up for the company to do that, and in my opinion, though no notice had been given before the commencement of the winding up, that is properly a liability the damages for which are capable of being proved, and, if capable of being proved, are capable under the mutual credit clause of being set off against any claim by the liquidator as against the Commissioners."

It is, I think, demonstrated by these authorities that in order to bring the mutual dealings section into operation it is not necessary that there should be mutual debts existing at the date of the winding up—that being, according to *In re Daintrey* (1), the material date; it is sufficient if there are contractual obligations the breach of which may give rise to a claim for damages provable in the winding up. The decision in *Lee and Chapman's Case* (2) goes even further, in that the winding up there did not in itself involve a breach, and there was in fact no maintainable claim for damages until the notice to repair had been given five months after the commencement of the winding up. Why are these principles not applicable to the case of a mortgagor policy holder? I cannot appreciate any satisfactory grounds upon which the breach of a contract of life assurance can be treated as distinguishable from the breach of any other contract in determining whether the mutual dealing provisions apply as between assurer and assured. It is true that, as a general rule, the sum assured will only become payable on the happening of a future event—the death of the assured—if certain recurrent payments are made by the assured in the meantime. But this is not always the case, as many policies assuring a sum to be paid at death are paid up in full by a limited number of premiums, all of which may well have been made before the commencement of the winding

(1) [1900] 1 Q. B. 546. (2) 30 Ch. D. 216.

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up, and even if the continued payment of premiums is a condition precedent to the ultimate receipt of the sum assured what distinction can be drawn between that contract and hundreds of others wherein are involved mutual obligations ? In all such cases obligations on the part of the claimant must be a factor in determining the quantum of the damage recoverable from the defaulting party, but their presence in the contract of assurance introduces no distinguishing element and cannot be a ground for placing such a contract in a category of its own. Nor, in my opinion, can the fact that the quantum of the damage sustained by the assured on the insolvency of the assurer and provable in such insolvency is ascertained by special statutory methods alter the fact that the amount so ascertained is damages for breach of contract and provable as such. The result is that, unless I am precluded from so doing by the decision of the Court of Appeal in *Ex parte Price* (1), I am prepared to hold that the class of respondents represented by Potter are entitled to be credited with the values of their respective policies against their respective indebtedness to the liquidating company.

Ex parte Price (1) does no doubt present a difficulty, and there are some expressions in the reported judgments which are not easy to reconcile with the extracts I have made from subsequent decisions, but there were, I think, certain facts there which are not present here, and one important passage in the judgment of James L.J., which justify me in distinguishing it from the present case.

There the policies had been valued under the special Act referring the affairs of the assuring companies to arbitration (The European Assurance Society Arbitration Act, 1872); the estates of the assurers and assured were both in liquidation and, as the mutual dealings provisions of the Bankruptcy Act had not at that date been extended to companies in liquidation, the liquidator of the assurers could not claim to deduct the mortgage debt from the value put upon the policies, but had to credit the estate of the assured with dividends on the full value. This being the position of the

(1) L. R. 10 Ch. 648.

companies in liquidation, the question arose whether the trustee in the liquidation of the affairs of the assured could successfully claim in his liquidation to set off against the mortgage debt and thereby wholly extinguish it, the larger sum at which the policies had been valued. The Court answered this question in the negative. It is important to see what a contrary decision would have involved. It would have meant this, that the liquidating debtor's estate would have received 20*s.* in the pound on the mortgage debt and interest and a dividend of 3*s.* or upwards on the difference between that amount and the 446*l.* 8*s.* at which the policies had been valued. If in similar circumstances the mortgage debt and interest had exceeded in amount the value of the policies, the companies in liquidation would have paid 20*s.* in the pound on the full value of the policies, and would receive only such dividend as the liquidating debtor's estate could pay on the excess.

In other words, the application of the mutual dealings provisions to the facts in *Ex parte Price* (1) would have brought about the very injustice which, according to Lindley M.R., they were framed to defeat.

It is true that the judgments are not expressly based on these considerations, but the observations of James L.J. at the beginning of his judgment, where he points out that at that time there was no right of set-off under the Companies Acts and therefore no set-off in favour of the liquidators against the claim of Dr. Lankester's trustee under the winding up, tend, I think, to show that he was not unmindful of the difference in the treatment the trustee was claiming to have meted out to him from that to which the liquidators had to submit.

The result is that, in my opinion, notwithstanding the judgment in *Paddy* v. *Clutton* (2), which naturally raises a doubt in my mind whether the conclusion at which I have arrived is sound, this case is not controlled by the decision in *Ex parte Price* (1), and the order on the summons must be

(1) L. R. 10 Ch. 648. (2) [1920] 2 Ch. 554.

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so framed as to give the mortgagor policy holders the full benefit of the mutual credits section and not the restricted right for which the other creditors have contended.

Solicitors: *Peter Thomas & Clark; Budd, Johnson, Jecks & Colclough; Timbrell & Deighton; Marcus & Francis; Pritchard & Sons; Hatchett-Jones, Bisgood, Marshall & Thomas; Clifford Turner & Hopton; Swepstone, Stone, Barber & Ellis.*

P. J. B.

ROMER J.
1923
Nov. 1.

In re ENGELBACH'S ESTATE.

TIBBETTS *v.* ENGELBACH.

[1923. E. 805.]

Insurance—Endowment Policy—Policy Money payable at End of Twenty-one Years to Daughter of Assured if then alive—Death of Assured within Period—Daughter not Party to the Contract—No Trust in Favour of Daughter—Policy Money, whether Part of Assured's Estate.

An endowment policy taken out by a person in his own name for the benefit of his daughter, to mature on her attaining a specified age, creates no legal estate in the daughter, and she cannot sue on the contract, nor does the assured thereby constitute himself a trustee for his daughter of the policy and of the moneys payable thereunder. If, therefore, the assured dies before the policy matures, the policy moneys belong, not to the daughter, but to the estate of the assured, and must be paid to his executors.

Cleaver v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147 followed.

On February 3, 1902, the testator took out an endowment policy with the Norwich Union Life Insurance Society to provide for the payment of the sum of 3000*l.* on February 3, 1923, if his daughter should so long live, at the annual premium of 99*l.* In the proposal form which the testator had to fill up and sign, he inserted opposite the words "Full name and description of the Proposer," the words "Edward Coryton Engelbach, for his daughter Mary Noel, aged one

month." By such policy the sum of 3000*l.* was expressed to be payable to the testator's daughter (therein called "the nominee"), her executors, administrators, or assigns, if she should survive February 3, 1923, and if she should not survive that date all the premiums which should have been paid were to be repaid without interest to the testator, his executors, administrators, or assigns. The testator paid the premiums down to and including that due in 1911, but he failed to pay the premium due on February 3, 1912. By a resolution of the directors of the society, dated March 8, 1912, and indorsed on the policy, the policy was revived as a fully paid-up policy for the reduced sum of 1428*l.* 12*s.*, with return in the event of previous death. By his will, dated March 10, 1914, the testator gave all his residuary estate to his trustees upon trust for his wife for life, and after her death upon trust for such of his children as his wife should by deed or will appoint, and in default of such appointment in trust for his children in equal shares, and he directed that the share of his daughter should be retained by his trustees upon certain trusts therein set out. The testator died on March 7, 1916, leaving a widow and three children. His widow died on May 23, 1919, without having exercised the power of appointment given to her by the will. The sum of 1428*l.* 12*s.*, payable under the policy, was paid by the Norwich Union Life Insurance Society on February 9, 1923, and the receipt for the same was signed by the testator's daughter. By a settlement, dated February 15, 1923, she assigned such money (inter alia) to trustees upon certain trusts therein set out, but by an arrangement between her and the trustees of the testator's estate, it was paid to a firm of solicitors on account of whoever might be held to be entitled thereto.

This summons was taken out by two of the trustees of the testator's will, and it asked whether the sum of 1428*l.* 12*s.* formed part of the estate of the testator and was payable to the trustees of his will, or whether the same belonged to and was payable to the trustees of the settlement as the assigns of the testator's daughter.

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P. H. L. Brough (*W. M. Hunt* with him) for the plaintiffs. *Hughes K.C.* and *Winterbotham* for the testator's daughter and the trustees of the settlement. There can be no question but that the policy moneys belong to the testator's daughter. This was plainly an advancement by the testator for the benefit of his daughter, the policy to belong to her if she survived or attained twenty-one. The presumption is in favour of the daughter: *In re Richardson.* (1)

Apart from authority, from the very nature of the case the moneys are to be paid to the daughter if she attained twenty-one. That was the contract. If she died under twenty-one, the father was entitled to get back the premiums paid, so that he could not have assigned the policy to her. The terms of the contract were for payment to the daughter, and the policy makes her father a trustee for her.

Stamp for the other residuary legatees. There can be no question of the testator's daughter having the legal estate. The contract was between the testator and the society; she was not a party to it, and cannot sue on it. The question then arises whether there was sufficient in the whole transaction to make the testator a trustee for his daughter. In order to hold that the testator had made himself a trustee, the Court would have to find, on the face of the policy, such a declaration of trust as would be valid between strangers. There was no such declaration in this policy, which was nothing more than a contract to pay a third party. It was a mere mandate, which was ended by the testator's death: *Gandy* v. *Gandy.* (2) The effect of taking out a policy in the name of a third party is considered at length in *Cleaver* v. *Mutual Reserve Fund Life Association.* (3) The money was simply the money of the testator in the hands of the society, and on the policy maturing he could demand to have it paid back to him. The executors now stand in his shoes. If the society pays the nominee, it cannot get a good discharge. That case was followed by Eve J. in *In re Burgess' Policy* (4), but it was not even cited in *In re A Policy No.* 6402 *of the*

(1) (1882) 47 L. T. 514.
(2) (1885) 30 Ch. D. 57.
(3) [1892] 1 Q. B. 147.
(4) (1915) 113 L. T. 443.

Scottish Equitable Life Assurance Society (1), where Joyce J. assumed that the nominee had a legal estate in the policy, and on that he grafted the doctrine of resulting trust. It is difficult to distinguish between *Cleaver* v. *Mutual Reserve Fund Life Association* (2) and the present case; the only distinction would be in the exact words of the proposal form.

Hughes K.C. in reply. The testator was a trustee for his daughter. He was contracting with the society on her behalf, but for himself if she died under twenty-one. The clear object of the policy was to provide for the daughter at twenty-one. The executors would have been trustees for her if the money had been paid to them. This is an endowment policy, not a life insurance policy. It is to provide for the testator's daughter, and to form part of her estate. There is every reason here for saying that the testator was a trustee for his daughter. *In re Flavell* (3) referred to.

ROMER J. A very similar question to the present one arose in *Cleaver* v. *Mutual Reserve Fund Life Association.* (2)

Before considering that case, however, I may say this: the daughter could of course successfully claim these moneys if she had at the death of the testator a legal right to them, that is to say, a right at law to recover the moneys from the society, because, although that legal right might have been given to her purely voluntarily by her father, still there would be no resulting trust in favour of the father, seeing that there would be a presumption of advancement. The only other ground upon which the daughter could claim these moneys as against the executors of her father would be that the father in some way constituted himself a trustee for the daughter of the policy and of the moneys payable thereunder.

In *Cleaver* v. *Mutual Reserve Fund Life Association* (2), it appears that a policy had been effected by one James Maybrick on his own life. It provided, in effect, that on the death of James Maybrick the money should be payable to

(1) [1902] 1 Ch. 282. (2) [1892] 1 Q. B. 147.
(3) (1883) 25 Ch. D. 89.

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Florence Maybrick, his wife, if then living, and that otherwise it should be payable to his personal representatives, so that the Court had to deal there, as I have to deal here, with a policy which provided for the payment of the policy moneys not to the person who effected the policy but to a third party. The question the Court had to decide was whether, inasmuch as the assured, James Maybrick, had been murdered by his wife, the insurance money formed part of the estate of the assured, on the ground that the trust which in that case was expressly imposed upon the policy moneys by the Married Women's Property Act, was a trust which could not in the circumstances be enforced. The decision therefore turned upon the Married Women's Property Act, 1882, but in the course of their judgments Lord Esher M.R. and Fry L.J. dealt with the case, in the first instance, as though the Married Women's Property Act had no application at all, and they considered what was the real effect at law and in equity of an insurance effected by a man on his own life, that insurance containing a provision that on the death of the assured the money should be paid to somebody other than the assured.

Lord Esher M.R. said this (1): "This policy of insurance is in a somewhat peculiar form, which I suppose is of recent invention. It does not state on the face of it with whom it is made, but states that for the considerations therein mentioned the defendants make the insured a member, and promise that on his death the policy money shall be payable to Florence Maybrick his wife, if then living, otherwise to his legal personal representatives. I will first consider what the legal effect of such a policy would be apart from the Married Women's Property Act, and if no such Act had been passed. The contract is with the husband, and with nobody else. The wife is no party to it. Apart from the statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband. The promise is one which could only take effect upon his death, and therefore it must be meant to be enforced by them. The condition on which the money is to become payable is the death

(1) [1892] 1 Q. B. 151.

of James Maybrick." A little further on he says: "Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants it would have no effect. She is no party to the contract; and I do not think that the defendants could have any right to follow the money they were bound to pay and consider how the executors might apply it. It does not seem to me that, apart from the statute, such a policy would create any trust in favour of the wife."

Fry L.J. says (1): "James Maybrick insured his life in the policy in question in the year 1888" (I will leave out a passage which I must refer to in a moment), "and in the policy itself she is named as the payee of the policy-moneys in the event, which happened, of her surviving her husband. Independently of the Married Women's Property Act, 1882, the effect of this transaction was, in my opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick the 2000*l.* assured; it would be broken by non-payment to her; but the cause of action resulting from such breach would vest in the executors of the assured, and not in the payee. She was, independently of the statute, a stranger to the contract; it might have been put an end to by the contracting parties without her consent, and the breach of it would have given her no cause of action against any one."

It follows from that that in the present case the daughter could not have enforced this contract in her own name against the insurance company, and that she was an absolute stranger to the contract, which could have been put an end to by both of the contracting parties without her assent. It also follows from that decision that the mere fact that the policy moneys are expressed to be paid to somebody other than the assured does not make the assured a trustee of the policy or of the policy moneys for the person so nominated.

I might mention that that case was followed in

(1) [1892] 1 Q. B. 157.

ROMER J. 1923 ENGELBACH'S ESTATE, *In re.* TIBBETTS *v.* ENGELBACH.

somewhat similar circumstances by Eve J. in *In re Burgess' Policy.* (1)

There is however a decision of Joyce J. in *In re A Policy No.* 6402 *of the Scottish Equitable Life Assurance Society* (2), which at first sight certainly seems to lend some colour to the argument presented to me on behalf of the daughter here. In that case a policy of insurance had been taken out by A. on his own life "for behoof of B.," and the policy provided that B. should be entitled to receive the policy moneys on A.'s death. It was held that the legal personal representatives of B., who received the moneys on the death of A., were trustees of the policy moneys for the legal personal representatives of A. The actual decision therefore is in accordance with the two cases I have already referred to. But the grounds on which Joyce J. based his decision were these. He treated B. as the person who had the right at law to enforce the policy and give a receipt for the policy moneys, but held that, being a stranger to A. and there being no consideration for his so being put into possession of this legal right to enforce the policy, B. would hold the policy moneys when received as trustee for A. in accordance with the doctrine of *Dyer* v. *Dyer.* (3)

It is said that it was quite unnecessary for Joyce J. to consider the case of *Dyer* v. *Dyer* (3) if Mr. Stamp's argument in this case is correct, because a very short way out of the difficulty was to say that B. had never obtained any legal interest in the policy or any right to receive the moneys payable thereunder. In point of fact, that particular point does not appear to have been argued at all, and *Cleaver* v. *Mutual Reserve Fund Life Association* (4) was not even cited. I cannot, therefore, regard that decision as carrying any weight in the determination of the particular point I have to deal with.

Coming therefore as I do to the conclusion that the daughter did not acquire any interest at law or in equity

(1) 113 L. T. 443.
(2) [1902] 1 Ch. 282.
(3) (1788) 2 Cox, 92, 93; 1 Watk. Copy 216.
(4) [1892] 1 Q. B. 147.

to the policy or the policy moneys merely by reason of the fact that the policy moneys are expressed to be payable to her, I still have to consider whether the testator ever constituted himself a trustee for the daughter in some other way.

It appears that in the proposal form which the father had to fill up and sign, he inserted opposite the words "Full name and description of the Proposer" the words "Edward Coryton Engelbach, for his daughter Mary Noel, aged one month," and it is said that by that means he constituted himself a trustee of the moneys payable under the policy.

But that point is also, I think, concluded by the authority of *Cleaver* v. *Mutual Reserve Fund Life Association.* (1) In the passage in Fry L.J.'s judgment, part of which I read just now, he says: "By the proposal which was made part of the policy he" (that is Mr. Maybrick) "expressed the policy to be effected for the benefit of his wife," and he came to the conclusion that, apart from s. 11 of the Married Women's Property Act, 1882, that fact would not have constituted Mr. Maybrick a trustee of the policy or the policy moneys for his wife.

The only distinction that I can see between that case and the present one is this. In the proposal form Mr. Engelbach, the father, did not say that he was effecting this policy for the benefit of his daughter, but said that he was making the proposal for his daughter. It is sought from that to draw the inference that the father was, by this proposal form, stating that he was entering into the contract on behalf of his daughter, not merely for her benefit, but was making the whole contract on her behalf. I cannot think that that is the true construction of this proposal form. It appears to me extraordinarily unlikely that a father would purport to enter into such a contract as this as agent for his daughter who was one month old, a contract which involved, if the father and the daughter were to get any benefit out of it, the continuous payment of a premium by the father. I think that the words of the proposal really mean no more in this case than the proposal made in the Maybrick Case (1), and that

(1) [1892] 1 Q. B. 157.

ROMER J. 1923 ENGELBACH'S ESTATE, *In re.* TIBBETTS *v.* ENGELBACH.

the father entered into this contract in his own name and on his own behalf, but for the benefit of his daughter.

In these circumstances I feel constrained by the authorities to which I have referred to decide against the contention of the daughter, and I must declare that the policy moneys form part of the estate of the father.

The costs of all parties as between solicitor and client will come out of the policy money.

Solicitors: *Reynolds & Sons; Nash, Field & Co.*

P. J. B.

TOMLIN J. 1924 *June* 25, 26.

In re HUGHES' SETTLEMENT.

HUGHES *v.* SCHOOLING.

[1924. H. 1114.]

In re SMITH.

HUGHES *v.* SCHOOLING.

[1924. S. 1364.]

Marriage Settlement—Covenant by Wife to settle all Property to which she was then or should during coverture become entitled, whether in possession, reversion or otherwise—Exception of "any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of 200l."—Aggregation of Interests vesting at the same time—Date for Valuation of Reversionary Interest.

An ante-nuptial settlement contained a clause providing that "All real and personal property (if any) not hereinbefore settled to which the said [intended wife] at the time of the said intended marriage or at any time during her now intended coverture shall be or become entitled whether in possession, reversion or otherwise (except moneys, chattels and effects . . . . and except also any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of 200*l.*) . . . . shall as soon as circumstances admit" be brought into settlement:—

Held, that (1.) the exception of "any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of 200*l.*" applied to a reversionary interest belonging to the wife at the date of the settlement; and

(2.) In ascertaining for the purpose of the exception the value of

reversionary interests acquired at one and the same time from different sources (*a*) the value of these interests ought not to be aggregated and (*b*) the value of each interest must be ascertained as at the date when it vested in possession.

BY a settlement dated July 15, 1872 (hereafter referred to as the 1872 settlement), and made in contemplation of the marriage of William Hughes and Ann Hall Hughes (therein referred to by her then name of Ann Hall Smith) it was declared that the trustees should stand possessed of a sum of 570*l.* Scinde, Punjab and Delhi Railway stock transferred to them and of the moneys to become payable on three policies of assurance on the life of William Hughes assigned to them upon trust to permit the said sum of stock to remain in its then state of investment or at the discretion therein mentioned to sell and reinvest the same and to invest the sums payable on the said policies when received in manner therein mentioned and to pay the income of the said premises and of the investments from time to time representing the same to Ann Hall Hughes during her life and after her death to William Hughes and after the death of the survivor of Ann Hall Hughes and William Hughes to stand possessed of the said trust property and the income thereof in trust for all or any the children or child of the said then intended marriage who being a son or sons should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry under that age and if more than one in equal shares.

By the will dated May 15, 1872, of John Smith (the father of Ann Hall Hughes), who died on April 6, 1873, he made a specific devise and certain specific bequests, and then gave to his trustees the sum of 2500*l.* upon trust for investment as therein mentioned and to pay the dividends or income thereof to his daughter Ann Hall Hughes (therein referred to as Ann Hall Smith) for her life for her separate use without power of anticipation and after her decease upon trust to divide the capital thereof between her children equally who should live to attain the age of twenty-one years.

William Hughes died on April 15, 1912, and Ann Hall

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Hughes died on December 19, 1923. There were eight children of the marriage, two sons and six daughters, all of whom were born after the death of John Smith and attained twenty-one years of age. Four of the daughters—namely, the defendants Mabel Pulsford Sedgwick, Dorothy Taynton Yates and Katharine Sevecke Oak-Rhind and Winifred Mary Potter, attained the age of twenty-one years before the dates of their respective marriages, and they all made ante-nuptial settlements dated respectively April 18, 1902, June 14, 1906, December 30, 1907, and June 8, 1909, of property other than their respective reversionary interests under the 1872 settlement and under the will of John Smith.

Each settlement contained a provision in the following terms: "All real and personal property (if any) not hereinbefore settled to which the said [intended wife] at the time of the said intended marriage or at any time during her now intended coverture shall be or become entitled whether in possession reversion or otherwise (except moveable chattels or effects of household domestic or personal use or ornament and except also any legacy or other property acquired at one and the same time not exceeding in amount or value the sum of 200*l.*) and except any sums received as income as distinguished from capital shall as soon as circumstances admit and at the cost of the trust estate be assured and transferred by the said [intended wife] and by all other necessary parties (if any) unto or otherwise vested in the trustees and shall be held by them upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the wife's trust fund."

Winifred Mary Potter died on August 19, 1913, and the defendant F. S. Potter was her administrator.

At the date of the death of Ann Hall Hughes the funds subject to the 1872 settlement were of the approximate value of 1202*l.* 16*s.* 3*d.*, so that the eighth share of a child of the marriage amounted approximately to 150*l.* At the same date the sum of 2500*l.* bequeathed by the will of John Smith was represented by investments of the value

of 1523*l.* 9*s.* 6*d.*, so that an eighth share amounted approximately to 190*l.*

At the date of the settlement made upon the marriage of each of the four daughters, her eighth share of the property comprised in the 1872 settlement was less in value than 200*l.*, and her eighth share of the fund representing the legacy of 2500*l.* bequeathed by the will of John Smith exceeded 200*l.*

In these circumstances two summonses were taken out to have it determined whether or not the share of each of the said four daughters in (*a*) the property comprised in the 1872 settlement and (*b*) the fund representing the said legacy of 2500*l.* was payable to her or to the trustees of her marriage settlement.

Droop for the summonses.

R. Turnbull for the trustees of the four daughters' marriage settlements. The reversionary interests to which each intended wife was entitled at the date of her settlement and marriage under the 1872 settlement and John Smith's will are within the provision in her settlement whatever their values might be, because as matter of construction the exception in this provision was not intended to apply to reversionary interests or at any rate to the existing interests. But even if this be not so, each wife's interests under the 1872 settlement and the will were liable to be aggregated for the purpose of ascertaining the value of the interest acquired. They were property acquired "at one and the same time" and there is no provision that the property must be acquired "from one and the same source": compare the ordinary form of after-acquired property clause in Key and Elphinstone's Precedents in Conveyancing, 11th ed., vol. ii., p. 641, and see *St. Leger* v. *Magniac.* (1) If, however, the interests are not to be aggregated it becomes material to ascertain at what date the interests ought to be valued. It is contended that the valuation must be of the actual shares as at the date of the settlement: Vaizey on Settlements, vol. i., p. 256. If

(1) [1880] W. N. 183.

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so, the share of the fund representing the legacy of 2500*l.* exceeded 200*l.* in value and is caught by the settlement. It is true that in Norton on Deeds, p. 602, it is said that the valuation to be taken in the case of a reversionary interest is "the value of the property itself when it falls into possession," but this is erroneous and does not accord with the authorities: *In re Mackenzie's Settlement* (1); *In re Clinton's Trust* (2); *Cornmell* v. *Keith.* (3) In so far as *Hood* v. *Franklin* (4) decides the contrary, it ought to be disregarded.

[TOMLIN J. Supposing duties are payable, are they deducted in determining the value?]

They are in the case of an interest in possession: *In re Pares.* (5)

[TOMLIN J. The duties could only be ascertained by reference to what is actually received in respect of the reversionary interest.]

It is submitted that in valuing a reversionary interest no duty would be deducted. It would be highly inconvenient if it could not be ascertained whether a reversionary interest was caught by an after-acquired property clause until it vested in possession.

W. M. Hunt for three daughters and the administrator of the deceased daughter. Neither interest is caught by the provision with regard to existing and after-acquired property of the wife. There is no ground for construing the exception as applying only to future interests. Further the interests under the 1872 settlement and the will ought not to be aggregated: *Hood* v. *Franklin.* (4) There remains the question of when the value of the interest ought to be ascertained. It is submitted that the time for valuation is when the interest is received. The fact that in ascertaining the value duty has to be deduced shows that valuation must be at that date. The difficulty of valuing at any other date would be immense. It is impossible to ascertain the value of a contingent interest under a class gift before it vests in

(1) (1867) L. R. 2 Ch. 345.
(2) (1872) L. R. 13 Eq. 295.
(3) (1876) 3 Ch. D. 767, 771.
(4) (1873) L. R. 16 Eq. 496.
(5) [1901] 1 Ch. 708.

possession. Moreover the fund in which the wife has an interest may itself vary in amount, as if, for example, the 1872 settlement had itself contained an after-acquired property clause, so that the share of each child might vary as fresh interests were caught by it in a manner impossible to foresee.

[*Turnbull.* In such a case the interest might either be caught on a valuation of the reversionary interest at the date of the settlement or on its valuation as an interest in possession if meanwhile it had been increased in value in the manner suggested.]

The use here of the expression "not exceeding in amount or value the sum of 200*l.*" indicates that it is the value of the property when received that is contemplated: if in cash then the amount of the cash, and if in specie then its value. The cases cited on the point do not really deal with it. They only decide that it is the value of the actual fund and not of a reversionary interest in it that has to be taken into account, and leave unsettled the date of the valuation.

TOMLIN J. The question I have to decide is whether the shares of a wife whose marriage settlement is before me in certain trust funds reversionary at the date of the marriage settlement, but since fallen into possession, are caught by the clause providing, subject to certain exceptions, for the settlement of the existing and after-acquired property of the wife. [His Lordship stated the facts and continued:] Now it appears that at the date of the marriage settlement and of the marriage shortly afterwards solemnized the value of the wife's one-eighth share in the legacy of 2500*l.* bequeathed by the will of her maternal grandfather exceeded 200*l.* upon the footing of the then value in possession of the funds representing the legacy, but that at the date of her mother's death the value of the share was less than 200*l.* So far as her share in the property comprised in her parents' marriage settlement is concerned its value is less than 200*l.*, whether that value be ascertained on the footing of the value of the property in possession at the date

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of the settlement or on the footing of its value at her mother's death.

It is therefore plain that the wife's share under her parents' settlement is not caught by the clause in her settlement, unless either the exception beginning with the words "except also any legacy or other property acquired at one and the same time" is applicable only to future interests, or this share has to be aggregated with that which came to her at the same time in respect of her share of the legacy of 2500*l.* by reason of the absence from this exception of the words "from one and the same source." There is no other reason for suggesting that there should be aggregation at all.

I am satisfied that the words "except also any legacy or other property acquired at one and the same time" cannot be confined to interests acquired by the wife at a future date, but that they extend also to interests already acquired at the date of the settlement. Further I do not think that the omission of the words "from one and the same source" from the exception involves the obligation to aggregate everything to which the wife has become entitled at the same time, although from different sources. I think that each acquisition is treated as a separate matter; and although the wife acquired contingent reversionary interests in both funds at birth and absolute reversionary interests on attaining twenty-one years of age, so that in that sense she acquired them at the same time, still they were separate acquisitions, and in the absence of an express provision for aggregation I do not think they ought to be aggregated. That is the conclusion I come to on the construction of this clause, and I obtain support for it from *Hood* v. *Franklin* (1), in which there is cited an earlier case of *In re Hooper's Trust* (2) to the same effect.

As to the wife's interest under the will of her maternal grandfather, the further question remains whether regard ought to be had to the value of this interest at the date of the settlement or to the value of what the wife became actually entitled to receive when the interest fell into possession.

(1) L. R. 16 Eq. 496. (2) (1865) 13 W. R. 710.

Mr. Turnbull, on behalf of those interested in contending that both the interests in question were caught by the settlement, has said all that can be said in support of this view, and he puts his argument in several different ways. First, he says that the interests were both reversionary interests at the date of the settlement and were then caught by the settlement, because the exception did not apply to reversionary interests, or at any rate only applied to future reversionary interests. I have already dealt with the contention that the exception only applied to future acquisitions, and I do not see any ground for saying that the exception does not extend to interests in reversion. This contention therefore fails. Next he says that the value of the interest must be ascertained as at the date of the settlement, so that the wife's interest in the 2500*l.* legacy is not within the exception. Of course it is plain that whatever be the date at which you take the valuation there will be inconveniences, and I doubt whether any assistance can be obtained by weighing the inconveniences. I think that all I can do is to put what seems to me the proper construction on the language of the clause in the settlement, whatever the resulting inconveniences may be.

Mr. Turnbull had cited a number of cases to me on this point—namely, *In re Mackenzie's Settlement* (1); *In re Clinton's Trust* (2); and *Cornmell* v. *Keith.* (3) I do not think any of these cases really assist him. The particular point does not appear to have been before the Court in any of these cases. It is quite true that there are passages in the judgments which seem to lend support to Mr. Turnbull's contention, but I doubt whether they can fairly be read in that sense, as in none of these cases was the mind of the Court directed to the particular point. It is stated in Norton on Deeds, p. 602, that "where only property of a named minimum value is to be settled, and the wife's interest is reversionary, the sum named means the value of the property itself when it falls into possession, not the value of the reversion when acquired"; and Mr. Norton cites in support of that proposition the very

(1) L. R. 2 Ch. 345. (2) L. R. 13 Eq. 295.
(3) 3 Ch. D. 767.

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same cases which have been cited by Mr. Turnbull in support of the contrary proposition. I doubt whether either side really gains much assistance from these cases. I have also been referred to a passage in Vaizey on Settlements, vol. i., p. 256, where the matter is put in this way: "In applying the test of value to a reversionary interest, the present value of the land or fund, not that of the reversionary interest in it, is to be taken." Now it is true that the learned author there uses the phrase "the present value of the land or fund," but I cannot help thinking that he was using it with rather a different meaning from that which Mr. Turnbull suggests that it bears, and that he was not directing his mind to the subject of time. He was only stating that it was the value of the fund and not of the reversionary interest in the fund that was to be taken into account, and was not determining at what date the valuation of the actual fund was to take place.

That is all the assistance the cases and text-books afford me. I think, however, that the language of the clause I am construing—and after all that is what I have to consider—indicates what the correct answer to this question should be, and points to the view that the time for applying the test of "amount or value" is the date when the interest vests in possession. It is obvious that if any other view were taken there might be serious difficulties. It does not in the least follow that the reversionary interest would be in a fund which was capable at the date of the settlement of any true valuation. It might be an interest in funds liable to violent fluctuations dependent on contingencies the happening of which was uncertain at the date of the settlement and indeed wholly unanticipated at that time. I think the only reasonable test in matters of this kind is what the beneficiary receives, and unless precluded from that view by the language of this clause the date of the receipt of the interest in possession is the one I should prefer. That is certainly made the test here in the case of the exception in favour of income, for the exception is of "any sums received as income as distinguished from capital." Moreover the expression "amount or value"

in the exception of "any legacy or other property . . . . not exceeding in amount or value the sum of 200*l.*" points to the form in which the interest is actually received, that is, cash or something acquired in specie. The whole clause appears to me to be constructed on that basis.

I therefore come to the conclusion that on the true construction of this clause neither of the two interests in question is caught by the settlement, the first because on any view as to the time of valuation it is too small unless there is to be an aggregation, for which I see no ground, and the second because what was actually received in respect of the share of legacy is less than the minimum amount fixed by the exception to the clause.

Solicitors: *Peacock & Goddard.*

H. C. G.

In re BALEN AND SHEPHERD'S CONTRACT.

[1924. S. 996.]

Vendor and Purchaser—Abstract of Title—Conveyance of Property to W. in Fee Simple—Subsequent Conveyance by W.'s Administratrix to Person recited to have become entitled in Equity—Incomplete Abstract—Defect of Title—Rescission.

The principle compelling a purchaser to accept as correct a recital in a conveyance forming part of the vendor's title that the grantee has become entitled in equity to the property being conveyed rests upon the grantor being the person who on the face of the abstract was the legal and beneficial owner of the property so that the recital operated as an admission binding on him.

When therefore an abstract of title traced the absolute legal and beneficial interest in the property being sold into C. H. W. and after his death his administratrix purported voluntarily to convey the property to G. A. W. by a deed containing a recital that G. A. W. (a predecessor in title of the vendor) had become entitled in equity to the property:—

Held, (1.) that the purchaser was entitled to go behind the recital and require it to be shown how G. A. W. had become entitled in equity for the administratrix could not by her admission bind C. H. W.'s heir at law, on whom, upon the face of the abstract, the beneficial interest in the property had devolved; and (2.) that the absence from the abstract of any record of how G. A. W. had become entitled in equity

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did not constitute a defect in title but merely a gap in the abstract, and the purchaser was not entitled to rescind the contract without giving the vendor a reasonable time to supply a complete abstract of title.

VENDOR AND PURCHASER SUMMONS.

The following statement of facts is substantially taken from the judgment.

By a letter dated November 7, 1913, and addressed by William Shepherd (hereinafter referred to as "the purchaser") to Messrs. Street and Creaser, auctioneers and surveyors, as agents for Alis Balen (hereinafter referred to as "the vendor"), the purchaser agreed to purchase from the vendor the freehold property known as "Highfield," No. 166, Hamlet Court Road, Westcliff-on-Sea, for the sum of 6450*l.*, and paid a deposit of 600*l.* The letter proceeded:—

"I agree to accept the vendor's title, provided such title is not defective, and to complete the purchase on or before the seventh day of January, 1924. If through my default the purchase is not so completed, I agree to pay interest at the rate of 6 per cent. per annum upon the unpaid balance until completion. The property is sold subject to the restrictions and stipulations common to the estate of which same forms part. It is understood that vacant possession will be given to me within three months and that the property is sold subject to a covenant restricting the sale of costumes and furs on any portion of the property, this restrictive covenant to run with the land."

This agreement was confirmed on behalf of the vendor by a letter of the same date from Messrs. Street and Creaser, and a letter dated December 12, 1923, signed by the vendor.

The abstract was delivered on December 19, 1923. It commenced with a conveyance on sale dated August 10, 1896, and disclosed a conveyance on sale on March 25, 1901, to one Charles Henry Wade, who subsequently mortgaged the property by a first mortgage dated August 15, 1901, and by a second mortgage dated October 7, 1902.

The document abstracted next after the second mortgage was a conveyance made between the second mortgagee of the first part, Eva Wade of the second part, and Georgetta

Annie Wade of the third part. This conveyance recited (inter alia) the death of C. H. Wade on October 10, 1903, intestate, and the grant on October 28, 1903, of letters of administration of his estate to Eva Wade, and seisin of C. H. Wade at his death in fee simple free from encumbrances except the first and second mortgages, and satisfaction since his death of the second mortgage. The same conveyance contained a recital that G. A. Wade had become entitled in equity subject to the first mortgage to the property and was desirous of having the same conveyed to her as hereinafter expressed, and by the operative part of the conveyance the property was conveyed by the second mortgagee and the administratrix to G. A. Wade in fee simple freed from the second mortgage.

The abstract then traced the title into the present vendor from G. A. Wade (subsequently referred to as G. A. Spencer), who paid off the first mortgage, obtained a reconveyance by deed dated June 15, 1911, and sold the property.

On January 3, 1924, requisitions were delivered. Nos. 24 and 25 are the material requisitions and are as follows: "No. 24. Who is Georgetta Annie Spencer? How did she become entitled in equity to the property conveyed by the indenture dated the 15th June, 1911." No. 25. "Was there any issue of the marriage of Charles Henry Wade and Eva Wade. Their marriage and any issue born therefrom must be proved by a statutory declaration by some competent person with the appropriate certificates of marriage and birth annexed." Answers were delivered on January 8, 1924, and the answers to requisitions Nos. 24 and 25 were as follows: "No. 24. G. A. Spencer was formerly G. A. Wade and understood to be a daughter of C. H. Wade. It is recited as a fact in deed of 13th May, 1908, that G. A. Wade had become entitled in equity and the vendor accepted that statement finally. If detailed information is required it can be obtained but at the sole expense of the purchaser. The testator died seised of the property more than twenty years ago and the vendor and her predecessors in title (including A. Wade) have been in free and uninterrupted possession

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since the death. Further G. A. Wade paid off the first mortgage of 800*l.* (dated 15th August, 1901) on the 15th June, 1911. See statutory declaration and see contract." Then the answer to No. 25 is: "This does not arise. See answer to No. 24 and see contract." Observations on replies were delivered on January 16, 1924, and Observation No. 4 was as follows: "Nos. 24 and 25 are repeated. The title shown by the abstract is defective in that there is no evidence that G. A. Wade was entitled in equity as recited in the deed of 13th May, 1908, or that there were no other children of C. H. Wade surviving him. The recitals in the deed of 13th May, 1908, are not sufficient evidence of the facts therein stated, the deed being less than twenty years old." The observations were answered on January 26, 1924, and the answer to Observation No. 4 so far as material was in the following terms: "Nos. 24 and 25. It was for the administratrix of C. H. Wade to consider the equities affecting the property and to convey it accordingly. Her recital that G. A. Wade had become entitled in equity was sufficient foundation for the conveyance to G. A. Wade and was obviously inserted for the purpose of keeping the details of her interest off the title and the validity of this as a conveyancing device has been accepted and acted on in three subsequent conveyances for value. It is submitted that under these circumstances the title is not 'defective.' The alternative is to enquire (if practicable) into the affairs of the Wade family. This would cause delay and would probably involve both the present parties in expense. At this distance of time it seems (apart from the conveyancing device referred to above) quite unnecessary."

On January 28, 1924, the purchaser's solicitor wrote to the vendor's solicitor the following letter: "I thank you for your letter of the 25th instant, returning my observations with your replies thereto, but regret I cannot accept the same as satisfactory. I have caused enquiries to be made in respect of the title of the late C. H. Wade to the property, and understand that G. A. Wade was not his heiress at law, there being two daughters, and if this is so, the title is clearly

defective. I am also informed that the vendor contracted to sell the property last year but could not complete owing to the state of the title. According to the abstract delivered, the vendor has not shown a good title, and therefore my client does not propose proceeding with the purchase, and I must ask you therefore to give instructions for his deposit to be returned to me. In view of the fact that your client knew at the time the contract was entered into that her title was defective, it appears to me that my client has a good claim for damages in respect of the expense he has been put to in the matter." The subsequent correspondence was as follows: On January 29 the purchaser's solicitor answered that letter by a letter in these terms: "I am in receipt of your letter of yesterday's date and have submitted the papers to counsel to advise. It is merely a question of expense in obtaining information leading up to the recital that G. A. Wade had become entitled in equity to the property subject to mortgage of 15th August, 1901. Your client is not entitled to cancel the contract unless he can prove that the title is defective and obviously he cannot do this until he has sufficient and proper information which would entitle him to say this. My client is advised that the title is not defective and the statements in the second and last paragraph of your letter are serious ones to repeat. Your information that the vendor contracted to sell the property last year but could not complete owing to the state of the title is not correct: the contract to which you refer was cancelled by mutual consent for reasons unconnected with the title. My client insists on the contract being carried out and I will write you again after taking the opinion of counsel on the title." Then after some formal letters this letter on February 12, 1924, was written by the purchaser's solicitor to the vendor's solicitor: "I have seen my client again on this matter, and in view of the nature of the title, he is not prepared to go on further with the matter, and I shall be glad, therefore, if you will give instructions for the deposit paid to the estate agents to be repaid to my client." On February 13 the

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solicitor replied: "I am in receipt of your letter of yesterday's date and do not agree that there is anything in the nature of the title which justifies your client in stating that he is not prepared to go on further with the matter. I have made enquiries of Messrs. Crossman Block & Co. of 16, Theobalds Road, W.C., the solicitors who prepared the deed in question. They are acquainted with all the circumstances and assure me that everything is in perfect order. They are preparing a report which I expect to receive by any post. This information would have been supplied earlier but for a bundle of papers having been mislaid in their office. It would have been obtained when my client made her purchase of the property but for the matter having to be completed urgently. I expect to be able to write you fully this week." On February 15 he wrote again: "I have now received a letter from Messrs. Crossman Block & Co. stating the circumstances which led up to the recital in the conveyance of 13th May, 1908, that Georgetta Annie Wade (afterwards Mrs. Spencer) was entitled in equity to the property, subject to the first mortgage. I enclose herewith a copy of the letter. You will see that it furnishes a complete explanation of how Mrs. Spencer became entitled, and also shows that it would have been somewhat difficult to deal with the title in the conveyance except by the method adopted—namely, a recital that Mrs. Spencer was entitled in equity. Messrs. Crossman Block & Co.'s letter shews also that my client's title is not and never has been defective, though the strict verification of the facts stated by them might involve some expense. Perhaps you will not think it worth while for your client to incur this; but, if you wish me to do so I shall be pleased to obtain from Messrs. Crossman Block & Co. any necessary evidence by statutory declaration or otherwise, of course at your client's expense. It would seem, however, that, practically Messrs. Crossman Block & Co.'s explanations, supported by possession by Mrs. Spencer and her successors in title since 1908, is sufficient, and I shall be obliged if you will now let me have draft conveyance. Of course your client's claim not to proceed with the purchase cannot be

admitted." The copy of the letter from Messrs. Crossman Block & Co., which is dated February 12, is to this effect: after an apology for the delay by reason of the loss of papers they say as follows: "The facts, however, appear to have been these: Dr. C. H. Wade, as we have previously informed you, was twice married. His first wife, Mrs. Mary Wade, was the daughter of Mr. George Katz Douglas, and Dr. Wade with Mr. Cartmell Harrison were the trustees of this gentleman's will, Dr. Wade being the surviving trustee. The will gave the testator's residue to his daughter Mrs. Mary Wade for life with remainder to her children. Mrs. Mary Wade died in May, 1899, having had two children only—namely, Minnie Douglas Wade and Georgetta Annie Wade. Dr. Wade died 28th October, 1903, intestate and insolvent and it appeared he had invested the trust funds under his father-in-law's will in the purchase of a medical practice and of the house 'Highfield' now 106, Hamlet Court Road, which he had mortgaged first to Mr. and Mrs. Fisher for 800*l.*, secondly to Mrs. Fisher for 300*l.* Mrs. Eva Wade, Dr. Wade's second wife, took out a grant of administration and out of moneys got in by her in respect of debts owing to her husband discharged the second mortgage of 300*l.* In May, 1905, Minnie Douglas Wade died leaving a will by which she left her residue equally between her sister Georgetta Annie and her cousin Miss Eleanor Hall. This property included her half share of 'Highfield' (as representing part of her grandfather's residuary estate) subject to the mortgage, and an arrangement was come to between Miss Hall and Miss Georgetta Annie Wade that Miss Wade should take Miss Hall's share of 'Highfield' as part of her share of her sister's estate. Miss G. A. Wade thus became entitled in equity to 'Highfield' subject to the mortgage for 800*l.* and accordingly as the property stood in the name of Dr. C. H. Wade it was thought that the simplest way of regularising the matter was to take a conveyance from Mrs. Fisher, the second mortgagee by direction of Mrs. Eva Wade as her husband's administratrix to Miss G. A. Wade subject to the first mortgage. This was accordingly done by the deed of 13th May,

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1908. The completed draft of this deed is in our office, and we have also the grant of administration to C. H. Wade, and office copy of the will of George Katz Douglas, the grandfather, and a deed of appointment of new trustees under his will in 1905 which partly recites the above facts. It will be seen, therefore, that Dr. C. H. Wade had really no beneficial interest in 'Highfield,' that it was purchased out of moneys forming part of the trust estate of G. K. Douglas and thus under the provisions of his will and the arrangements between Miss G. A. Wade and her sister's representatives passed entirely to Miss G. A. Wade. We hope this explanation may enable you to overcome the difficulty you are experiencing and while we cannot assume any responsibility or liability in the matter we should have no objection to producing the above-mentioned documents in our possession if this would assist matters."

On February 15, 1924, the purchaser's solicitor, who appeared not to have then received the letter of the vendor's solicitor containing this enclosure, wrote as follows: "My client is advised that the title as deduced is defective, and he has accordingly decided not to go on with the matter. I must ask you therefore to give instructions for the deposit to be repaid to my client." On February 16 the vendor's solicitor wrote: "I am in receipt of your letter of the 15th instant which has crossed mine of the same date. Counsel has advised that the title is not defective and on behalf of my client I strongly object to the expression used in your letter. You are not at liberty to say that the title is defective without having before you sufficient information which would entitle you to say this and obviously you had not this when your previous letters were written. My client insists upon the contract being carried out and I am instructed to enforce it." Then that is acknowledged, and on February 21 the purchaser's solicitor writes again: "Referring to your letter of the 16th instant, I have now heard from my client thereon, and he is not prepared to alter the decision he has already come to not to proceed further with the matter. I must ask you therefore to give instructions to the estate agents to return

to my client the amount of the deposit forthwith." That is answered on the 23rd: "Your client is seeking to avoid his contract by suggesting that the title is defective, indeed he attempted to do this even before information on the subject of the recital in the abstracted deed of 13th May, 1908, was before you. The purchaser by his contract has agreed to accept the vendor's title providing such title is not defective. My client is advised by counsel that it is not and never has been defective and I do not suppose that you seriously mean to contend that it is; at any rate you have not shown any grounds and my client is able to adduce evidence to support her title. Mrs. Balen considers that the purchaser is endeavouring to find a means of getting out of his contract if possible. My client will not release him. Unless therefore I hear from you by Tuesday next that the purchaser intends to complete his purchase forthwith I shall be reluctantly compelled to take proceedings at once to enforce the contract in accordance with my final instructions and without further notice." That is answered on the 26th: "I am in receipt of your letter of the 23rd instant. It is not a question of my client endeavouring to get out of his contract. He has been advised that the title is defective, and is naturally not prepared to proceed with the purchase. The grounds of his objection are sufficiently raised in my requisitions. If your client thinks it wise to take proceedings to enforce specific performance of the contract, I shall be prepared to accept service of proceedings on my client's behalf."

On March 7, 1924, the purchaser issued this summons asking that it might be declared (1.) That the requisitions and objections of the purchaser in respect of the title to the property comprised in the contract of sale had not been sufficiently answered by the vendor and that a good title to the property had not been shown; (2.) That the vendor might be ordered to return the deposit of 600*l.* with interest at the rate of 4*l.* per cent. per annum from November 7, 1923, until repayment; and (3.) that the vendor might be ordered to pay the purchaser his costs of investigating title and of this application.

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Galbraith K.C. and *Boraston* for the purchaser. The abstract disclosed a "defect" in the title, for the recital that G. A. Wade was entitled in equity was not an effective admission, seeing that it was not an admission by the person absolutely entitled but only by the administratrix of one who on the face of the title appeared to be so entitled. If so, the purchaser had the right on January 28, 1924, to rescind the contract and require a return of his deposit, and the Court can now determine that there has been rescission and order the return of the deposit.

[TOMLIN J. Is that a matter I can determine on a vendor and purchaser summons ?]

Yes. That point is dealt with in Wolstenholme's Conveyancing and Settled Lands Acts, 10th ed., p. 16. Further, the vendor has not established a possessory title. Mere possession over a long period of years is not sufficient. It must be shown who were rightfully entitled and that the vendor's possession has barred their claim : Williams on Vendor and Purchaser, 3rd ed., p. 97, and see *Warren* v. *Murray*. (1) Further the purchaser cannot have a possessory title forced upon him : *In re Nisbet and Potts' Contract*. (2)

Gavin Simonds K.C. and *J. Beaumont* for the vendor. This summons is misconceived. It is contrary to the practice of the Court to allow a purchaser to go behind a recital in a conveyance forming part of the vendor's title that A. B. is entitled in equity : *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (3) ; *In re Chafer and Randall's Contract* (4) ; *In re Soden and Alexander's Contract*. (5) If C. H. Wade had in fact been a surviving trustee of the property so that it would be his administratrix's duty to convey it to new trustees, a recital that they were entitled in equity would have been sufficient.

[TOMLIN J. There was no indication on the face of the abstract that C. H. Wade was a trustee. How then could the recital suffice in the absence of the person who, on the

(1) [1894] 2 Q. B. 648.
(2) [1905] 1 Ch. 391, 401.
(3) (1883) 24 Ch. D. 720.
(4) [1916] 2 Ch. 8.
(5) [1918] 2 Ch. 258.

footing that Wade was the beneficial owner, would be entitled as his heir at law ?]

In re Harman and Uxbridge and Rickmansworth Ry. Co. (1) shows that the Court will not go behind such a recital in a deed executed by the legal personal representative of the person appearing on the face of the abstract to be absolutely entitled.

[TOMLIN J. Is not the principle upon which such a recital is accepted that the person appearing on the face of the abstract to have the absolute legal and beneficial interest is a party to the deed and bound by the recital as an admission by him ?]

It is sufficient that the admission should be made in the presence of the person who appears to be entitled to convey the property. The authorities show that it makes no difference whether it is a mortgage debt and the security therefor or an absolute interest that is being conveyed. Here there was an admission by the person in whom the property vested on C. H. Wade's death that she held it in trust for G. A. Wade, and that is sufficient.

Even however if this were not so, the purchaser was not entitled to rescind on January 28, 1924, or at all. There was no defect of title but at most an incomplete abstract of title, and the vendor was at all times willing to obtain the necessary information to complete it. A right to rescind would only arise if there was unreasonable delay in doing this : Williams on Vendor and Purchaser, 3rd ed., p. 45. The correspondence shows that the vendor has never yet been given a reasonable opportunity of filling in the gap in the abstract, but that from January 28 onwards the purchaser insisted upon rescinding. The vendor has notwithstanding that supplied a great deal of information and is entitled to a reasonable time to supply and prove the missing link. If the vendor is right as to this it is unnecessary to go into the question whether she has a good possessory title.

Galbraith K.C. in reply. The rule against going behind a recital that A. B. is equitably entitled does not apply here.

(1) 24 Ch. D. 720.

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C. H. Wade appears in the abstract to be absolutely entitled, and on his death intestate his heir at law became entitled, and Wade's administratrix could not validly convey the property voluntarily to some one other than the heir at law without his consent.

In re Harman and Uxbridge and Rickmansworth Ry. Co. (1) related to a mortgage debt and has no application here. The cases relating to mortgages stand on a separate footing, and in all other cases the recital loses its value unless the person legally and beneficially entitled is a party to the deed containing it so that it operates as an admission by him : *In re Chafer and Randall's Contract.* (2) Therefore there was here a defect of title, and that being so the purchaser was entitled to rescind.

[He also referred to *In re Hailes and Hutchinson's Contract.* (3)]

Cur. adv. vult.

June 27. TOMLIN J. delivered the following written judgment. This is a purchaser's summons under the Vendor and Purchaser Act asking in effect for a declaration that a good title has not been shown to the property agreed to be purchased, and to have the deposit returned on the footing that the contract has been rescinded, and other consequential relief. [His Lordship then stated the facts and continued :] It will be observed that the purchaser on January 28, 1924, after having been informed that the vendor was prepared to furnish the information to establish the equitable title of G. A. Wade, affected to rescind the contract, and on February 15, 1924, after having been furnished with an outline of such equitable title, adhered to his decision to rescind. On March 7, 1924, the present summons was issued by the purchaser.

The purchaser's case is that on January 28, 1924, the vendor's title was defective because G. A. Wade was not the heiress at law of C. H. Wade, and the abstract did not show

(1) 24 Ch. D. 720. (2) [1916] 2 Ch. 8.
(3) [1920] 1 Ch. 233, 237.

how she had become entitled in equity, and that, in those circumstances, on that date he was entitled to rescind and did in fact properly and effectually rescind the contract.

The vendor's answer is: First, that the purchaser was not entitled to go behind the recital in the conveyance of 1908 as to the equitable title of G. A. Wade; secondly, if the vendor is wrong on his first point, there was on the abstract no such defect of title as entitled the purchaser to rescind on January 28, 1924, but only an omission in the abstract which the vendor was willing and offered, and would have been able if a reasonable opportunity had been given her, to supply; and thirdly, that the vendor in any case can show a statutory title which the purchaser will be bound to accept.

As to the first point, I think the vendor is wrong. The principle entitling a vendor to rely upon a recital to the effect that a grantee to whom the property is conveyed is entitled in equity rests, I think, on this, that where a grantor is on the face of the abstract entitled legally and beneficially, he can admit and is bound by a recital of the equitable title of his grantee, and that a purchaser taking from the grantee or his successors in title is not bound to inquire as to the instruments, acts in the law, and events which found the grantee's equitable title, and getting the legal estate will not be affected with notice of any adverse equitable claim if in fact the grantee's equitable title was defective.

It is true that the use of this device for the purpose of keeping the equitable title off the abstract is not confined to the case of the devolution of a mortgage: see *In re Chafer and Randall's Contract* (1) and *In re Soden and Alexander's Contract.* (2) But it can, in my opinion, be utilized only where the whole legal and beneficial interest is on the face of the abstract in the person who conveys to the grantee recited to be entitled in equity.

In the present case on the face of the abstract the whole legal and beneficial interest subject to mortgages was in C. H. Wade at his death, but the abstract discloses the death of C. H. Wade intestate, and the question is whether his

(1) [1916] 2 Ch. 8. (2) [1918] 2 Ch. 258.

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administratrix was (subject to the mortgages) the person legally and beneficially entitled in these circumstances. I do not think she was. On the face of the abstract the heir at law was interested, and there is no power, statutory or otherwise, of which I am aware empowering the administrator by admission to give away the interest of the heir.

The legal personal representative of a deceased mortgagee may well be, with regard to the mortgage debt and the securities for the same, in a position, different from that occupied by the administrator in relation to land of which on the face of the abstract his intestate died seised legally and beneficially in fee simple, and able by an admission as to the title of the debt of his testator or intestate to bind the property so far as it is a security for the debt: see *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1)

As to the second point I do not think that the purchaser was on January 28, 1924, entitled, as has been on his behalf maintained before me, to rescind the contract. The title was not necessarily defective. The abstract and the proof adduced were no doubt insufficient, but the vendor had offered to establish the correctness of the recital in question, and I think the purchaser was bound to give her a proper opportunity of doing so. That opportunity has hitherto been refused to her.

In these circumstances, in my opinion the purchaser cannot claim to have the contract treated as rescinded and the deposit returned, but the vendor is entitled to be afforded a reasonable opportunity of proving a title.

Having regard to the result at which I have arrived on the first two points, I do not think that at this stage I can properly deal with the point raised as to the Statute of Limitations. The result is that the summons fails and it must fail with the usual consequences.

Solicitors: *Vizard, Oldham, Crowder & Cash, for F. T. Fisher, Southend-on-Sea; M. A. Jacobs.*

(1) 24 Ch. D. 720.

H. C. G.

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C. A.
1923
TOMLIN J.
Nov. 28, 29, 30; *Dec.* 6, 7, 21.
C. A.
1924
May 13, 14, 15.

[1922. K. 1270.]

Restrictive Covenants—Benefit annexed to Public Road—Road taken over by Local Authority—Enforceability—Building Agreement—Absence of Essentials of Building Scheme—Injunction—Discretion of Court—Absence of Damage.

The benefit of restrictive covenants relating to the mode of building on an estate through which a road runs can be validly annexed to the site and soil of the road so as to run with it, even after it has been dedicated to the public; but if the road is subsequently taken over by a local authority (whether under the Metropolis Management Act, 1855, or the Public Health Act, 1875) a successor in title of the original owner of the road ceases to have such an interest in it as will entitle him to enforce the covenants. The surface of the road is no longer vested in him and the restrictions do not touch or concern such interest in the road as he retains.

Per Tomlin J. (the Court of Appeal expressing no opinion on this point): The Court has a judicial discretion with regard to granting an injunction to prevent the breach of a restrictive covenant, where there is no privity of contract between the parties; and it will not grant an injunction where no damage can be proved by the person seeking to enforce the covenant and the breach is not of a kind to cause any nuisance or annoyance.

Decision of Tomlin J. affirmed upon the other grounds relied on by him.

The essentials of a building scheme discussed and held on the facts not to exist.

WITNESS ACTION.

The following statement of the facts is substantially taken from the judgment of Tomlin J.:—

This is an action to enforce restrictive covenants in respect of two semi-detached houses known as Nos. 40 and 42 Fitzjohn's Avenue, Hampstead, the property of the defendant. The facts of the case are shortly as follows: In and before the year 1877 the late Sir Spencer Maryon Maryon-Wilson was the owner of a large estate in Hampstead and agreed to sell part thereof, being the land the subject matter of the agreement next hereinafter mentioned, to two brothers, Herbert Kelly and the plaintiff Edward Kelly, who were carrying on the business of builders in partnership.

The agreement for sale was dated May 14, 1877, and was

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made between Sir Spencer Maryon Maryon-Wilson of the one part and Herbert Kelly and Edward Kelly of the other part. By the first clause the vendor agreed, subject to the conditions thereinafter contained, to sell and the purchasers to purchase at the price of 39,400*l.* the several pieces or parcels of land respectively situate on either side of the new public road called Fitzjohn's Avenue in the parish of St. John's, Hampstead, which were delineated and with their respective abuttals and boundaries shown on the plan drawn in the margin of the second side of the agreement and thereon coloured pink and the inheritance thereof in fee simple in possession free from incumbrances. Then cl. 2 provides: "The purchasers having paid a deposit of 1000*l.* at the time of the signing of this agreement shall pay off the residue of their said purchase money by yearly instalments of not less than 5000*l.* each (except as to the last instalment which shall be the sum of 8400*l.*) each of which shall be payable on the 25th day of March in each year . . . . it being an express condition of this sale that the whole of the said purchase money of 39,400*l.* shall be paid off by the purchasers before or at the latest on the 25th day of March 1884 and the first payment of such instalments shall be made on the 25th of March 1878." Then cl. 3 provided that the purchasers should pay interest on so much of the purchase money of 39,400*l.* as should for the time being remain unpaid at or after the several rates thereinbefore respectively mentioned from the time possession of the hereditaments was given to the purchasers to March 25, 1878, at certain rates mentioned in that clause. I need not refer to any other clause in the agreement until I get to cl. 13. All the earlier clauses deal with matters of title. By cl. 13 it was provided: "As soon as the purchasers shall in writing have without any reservation or qualification whatsoever but absolutely and irrevocably accepted the title shown by the vendor to the whole of the property hereby agreed to be sold it shall be lawful for the purchasers to enter on all or any particular portions or portion of the property for the purpose of erecting and building and executing and doing thereon such dwelling

houses and other buildings works and things as hereinafter mentioned and generally for commencing and carrying on the building operations referred to or contemplated in or by these presents." By cl. 14 it was provided: "The purchasers shall on or before the 24th of June 1878 lay out and expend a sum of at least 5000*l.* in building such houses as are hereinafter provided and within six months after they shall have entered on any portion of the land hereby agreed to be sold for the purpose of building any house or other permanent erection thereon shall erect and for ever thereafter maintain good and sufficient brick walls of the height of not less than 5 ft. 6 in. each as boundary walls" as therein mentioned. Then there are a number of provisions in subsequent clauses with regard to the erecting of proper boundary fences, and matters of that sort, on other parts of the property within twelve months after they may have entered thereon for building. Then there are a number of provisions with regard to building in the subsequent clauses. Clause 18 provides: "All the dwelling houses built on the land hereby agreed to be sold shall either face or have their front entrance facing to Fitzjohn's Avenue aforesaid and no buildings of any kind other than walls or fences not less than 5 ft. 6 in. in height (to be constructed subject to the approval aforesaid) or gateways porticoes or bay windows shall be erected or placed on the east side of that avenue nearer the east footway thereof than the dotted building line shown on the plan." So that clause provided for a building line. Then cl. 19 provided: "No dwelling houses or portions of dwelling houses shall be erected on the land hereby agreed to be sold of less value than 2000*l.* in the case of each detached house and of less value than 1400*l.* in the case of each semi-detached house," and the clause goes on to provide how that value was to be ascertained. By cl. 20, which is really the important clause for the purposes of this action, it is provided: "No buildings other than messuages for private residences and the stabling as hereinafter referred to shall be erected on the property or when erected shall be used for any purpose other than for private residences." Then cl. 24 provided: "The

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purchasers shall at their option be entitled to have either one conveyance made to them by the vendor of the whole of the land hereby agreed to be purchased when the whole of the said purchase money of 39,400*l.* and all the interest becoming payable thereon shall have been paid and this agreement shall in all respects have been completely performed by the purchasers or they shall (subject to the conditions hereinafter in this clause contained) be entitled to have conveyances of separate portions of the said lands made to them from time to time by the vendor on the terms of having paid or of then paying for such portions such a sum of money as after the rate of 2750*l.* per acre shall be properly payable as the purchase money therefor and all interest at the rates respectively aforesaid accruing payable on the whole or balance of such purchase money up to the time of the payment thereof and of there then being in the opinion of the surveyor for the time being of the vendor erections and buildings of the cost value of 3000*l.* in the whole standing and being on other portions of the land not so conveyed such erections and buildings being houses properly roofed in and sufficiently drained. . . . ." Then there is a proviso that: " as regards the lands so included in any partial or separate conveyance all the stipulations of this agreement shall have been fully complied with." Then cl. 25 provides: " Every conveyance made to the purchasers shall be according to a model form marked ' A ' and signed by the parties hereto as showing their approval thereof but not by way of conveyance or assurance."

The land the subject matter of the agreement consisted of a piece of land on the east side of and fronting upon Fitzjohn's Avenue, between Akenside Road on the north and Belsize Lane on the south, and a piece of land on the opposite and west side of and fronting upon Fitzjohn's Avenue, between Nutley Terrace on the north and College Crescent on the south. The land coloured on the plan did not include any part of the site of Fitzjohn's Avenue, which at that time had apparently been dedicated by Sir Spencer to the public, but had not been taken over by the local authority.

The model form of conveyance " A " was headed: " Model

deed to meet case of works not completed, and it is expressed to be made between Sir Spencer Maryon Maryon-Wilson of the first part, Herbert Kelly and Edward Kelly of the second part and , who no doubt was intended to be the sub-purchaser from the Kellys, of the third part." After recitals that Sir Spencer was seised and that Sir Spencer had agreed with the Kellys for the sale to them of several pieces of land, one of which was the piece of land thereinafter described, and that it was agreed that the Kellys should be entitled to have conveyances of separate portions on the terms provided by the agreement, and that the Kellys acting under the authority of the agreement entered upon the land and built and executed thereon a number of dwelling houses and other buildings, it continued: "And whereas the said Herbert Kelly and Edward Kelly have agreed with" the sub-purchaser "for the sale to him of the said piece of land" at a price which is named, "And whereas the sum of money which after the rate of 2750*l.* per acre is the sum properly payable to the said Sir Spencer Maryon Maryon-Wilson as the purchase money for the said piece of land . . . . was the sum of pounds and the whole of that sum has been paid to him . . . . and whereas all the conditions imposed by the said agreement for sale . . . . between" Sir Spencer and the Kellys "have so far as regards the said piece of land . . . . been performed." The deed then witnessed that in consideration of the appropriate sum paid to Sir Spencer and the balance of the purchase price by the sub-purchaser paid to the Kellys Sir Spencer at the request of the Kellys granted to the sub-purchaser his heirs and assigns "all that piece of land situate on the side of the new public road called Fitzjohn's Avenue in the Parish of St. John's Hampstead in the County of Middlesex, which is delineated and with its abuttals and boundaries shown on the plan drawn in the margin of these presents and thereon coloured ." Then there is a reservation in these terms: "Reserving however to the said Sir Spencer Maryon Maryon-Wilson his heirs and assigns the full right to build" on certain adjoining land up to the boundary "and also the right in

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common with " the sub-purchaser " his heirs and assigns to drain into and use the said sewers and to use the roads pathways and kerbs of Fitzjohn's Avenue aforesaid as fully and freely as the said Sir Spencer Maryon Maryon-Wilson his heirs and assigns may desire to do (it being declared "—and these are the important words—" that no part of the site or soil of Fitzjohn's Avenue aforesaid is comprised in the grant of the piece of land and hereditaments hereinbefore expressed to be hereby made by the said Sir Spencer Maryon Maryon-Wilson)." Then after a number of other provisions the sub-purchaser enters into a covenant with Sir Spencer in these terms: " And the said doth hereby for himself his heirs executors administrators and assigns covenant with the said Sir Spencer Maryon Maryon-Wilson his heirs and assigns owner and owners for the time being of the site and soil of Fitzjohn's Avenue aforesaid in manner following that is to say," and then there follow all the restrictive or other covenants with regard to user, which are stipulated for in the original agreement, including the covenant that " no buildings other than a messuage or messuages for private residence and stabling shall at any time hereafter be erected on the said piece of land . . . . and that no messuage for the time being erected on the said piece of land shall be used for any purpose other than a private residence." Then there is the following proviso at the end of these covenants: " Provided always and it is hereby agreed and declared that the said Sir Spencer Maryon Maryon-Wilson his heirs or assigns owners for the time being of the site and soil of Fitzjohn's Avenue aforesaid shall at any time or times hereafter have power to assent to any alterations of and also altogether to release any of the covenants hereinbefore contained at the request of the said his heirs or assigns owner or owners for the time being of the land with respect to which such alterations or release shall be requested."

Another model form of conveyance marked " B," to which there is no reference in the agreement as executed, was also prepared to meet the case of works completed. So far as it

concerned the reservation of the site of the road to Sir Spencer, and the imposition of restrictive covenants, it did not differ from Form " A."

By a subsequent agreement dated March 1, 1878, and made between the same parties, as in the case of the original agreement, a small modification not material to this case was made in the area of the land comprised in the original agreement.

The course which this matter took was as follows: The Kellys from time to time built houses and sold them, the sub-purchaser taking a conveyance direct from Sir Spencer, or before selling them the Kellys took a conveyance from Sir Spencer and themselves conveyed to the sub-purchaser when they sold. In some few cases the Kellys sold pieces of the land, leaving the sub-purchaser to build. In the result fifty-one houses were built, twenty-three of the fifty-one sites being conveyed by Sir Spencer direct to sub-purchasers of the Kellys, and the remaining twenty-eight being conveyed to the Kellys, who sold some and retained others. The conveyances, whether to the sub-purchasers or to the Kellys, although they did not in all respects adhere to the model forms, seem, so far as can be judged from such of them as have been produced, to have had this common characteristic: that there was a declaration that no part of the site or soil of the road was comprised in the grant, and that the grantee or grantees entered into covenants with Sir Spencer his heirs and assigns as owners for the time being of the site and soil of Fitzjohn's Avenue in the form of the covenants contained in the sale agreement between Sir Spencer and the Kellys. Although only a few of the conveyances have been produced, I do not think it is suggested that there was in any case any substantial variation, and, at any rate, for the purposes of this judgment, I shall assume in the plaintiffs' favour that all the conveyances were substantially in the same form.

Before May, 1880, the Kellys had built upon part of the land on the east side of Fitzjohn's Avenue two semi-detached houses, formerly known as Nos. 14 and 13, but now known as Nos. 40 and 42 Fitzjohn's Avenue. These are the houses which are the subject matter of the action.

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By a conveyance dated May 11, 1880, Sir Spencer conveyed No. 14 (now No. 40) Fitzjohn's Avenue to the Kellys. This conveyance contained the usual declaration as to the site and soil of the road, and the usual covenants entered into by the Kellys with Sir Spencer his heirs and assigns as owners of such site. The plan attached to the conveyance showed nothing but the strip of land conveyed with the house thereon. In a similar form was a conveyance dated May 14, 1880, whereby No. 13 (now No. 42) Fitzjohn's Avenue was also conveyed by Sir Spencer to the Kellys.

The Kellys subsequently sold No. 40 to Allan Moline Horner, and by a conveyance dated July 30, 1880, conveyed it to him subject to the covenants contained in the conveyance of May 11, 1880. The conveyance contained the following covenant by Horner: "The said Allan Moline Horner doth hereby for himself his heirs executors and administrators covenant with the said Herbert Kelly and Edward Kelly their heirs and assigns that he the said Allan Moline Horner his heirs and assigns will henceforth observe perform and keep the covenants stipulations and conditions contained in the said indenture of the 11th May last so far as the same remain to be performed." Then there is a provision that A. M. Horner will keep indemnified the Kellys "from all loss, costs, charges, damages, and expenses to be incurred or sustained on account of the non-performance or breach thereof."

By a conveyance dated November 1, 1881, the Kellys conveyed No. 42 Fitzjohn's Avenue to Richard Harris subject to the covenants contained in the conveyance of May 14, 1880, and Harris entered into a covenant similar to that on the part of Horner, which I have already read.

On November 23, 1882, Fitzjohn's Avenue was taken over by the local authority under the appropriate public statute.

Sir Spencer subsequently died, and the plaintiff Sir Spencer Pocklington Maryon Maryon-Wilson is his successor in title, and as such has vested in him, subject to the interest of the local authority, the site of Fitzjohn's Avenue. Herbert

Kelly died some years ago, and the plaintiff Edward Kelly, as the survivor of the two brothers, is entitled to the whole Kelly interest. Some of the houses built by the Kellys are still vested in the plaintiff Edward Kelly.

Recently the defendant purchased and had conveyed to her Nos. 40 and 42 Fitzjohn's Avenue. It is said she was told when she purchased that there were no restrictive covenants. It is admitted, however, that she must be taken to have constructive notice of the restrictions in the conveyances of May 11 and 14, 1880, if they are enforceable against her.

The defendant is a medical practitioner, and purchased the houses and is using them for purposes connected with her profession—namely, as a home where she can have some of her private patients under her immediate care. There is nothing in the exterior of the house to show that it is used otherwise than as an ordinary private residence. No nuisance of any kind is alleged, and indeed until the attention of the plaintiff Kelly was called, by an anonymous letter, to the fact, the nature of the user was not known or suspected. It is admitted, however, that the user is technically a breach of the covenant not to use for any purpose other than a private residence.

The action was begun on November 8, 1922, by the plaintiff Kelly for an injunction to restrain the user of the houses as a nursing home on the ground that it was a breach of the covenants in the conveyances of May 11 and 14, 1880. On June 20, 1923, after the statement of claim had been delivered, the writ was amended by adding Sir Spencer Pocklington Maryon Maryon-Wilson as a co-plaintiff.

Evidence was called by the plaintiffs to try and show that the dealings of the Kellys with the land purchased by them from Sir Spencer Maryon Maryon-Wilson were such as to constitute a building scheme created by them, but substantially no evidence in support of this case could be adduced.

The action came on for hearing before Tomlin J. on November 28, 1923.

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Greene K.C. and *Baden Fuller* for the plaintiffs. The covenant to maintain Nos. 40 and 42 Fitzjohn's Avenue as private dwelling houses can be enforced against the defendant, as she had constructive notice of the covenants contained in conveyances dated May 11 and 14, 1880, of these premises. The plaintiff Sir Spencer Pocklington Maryon Maryon-Wilson is now the owner of the soil of Fitzjohn's Avenue, subject to the rights acquired by the local authority when it took over the road in 1882. When a road is taken over there passes to the local authority such part only of the soil as is required for preserving, maintaining and using it as a street: *Tunbridge Wells Corporation* v. *Baird* (1); *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co.* (2); *Rolls* v. *Vestry of St. George the Martyr, Southwark* (3); and a sufficient interest in the road remained vested in the plaintiff, Sir Spencer, to entitle him to enforce the restrictions. If a restrictive covenant, the benefit of which was annexed to a road, was on the face of it taken solely for the benefit of the covenantee and his successors in title, the Court might well hold that after the road had been taken over by a local authority his successor in title was no longer sufficiently the owner of the road to be able to enforce the covenant. It is different where, as in this case, the object was not to benefit the covenantee but to enable him and his successors to keep control of the user of the estate for the benefit of its occupants. It is necessary to look at the object of the covenants to ascertain what suffices to constitute a quasi-dominant tenement. The covenants in this case seem to have been assumed to be enforceable in *Milch* v. *Coburn.* (4)

It may be suggested that the covenant cannot be enforced by injunction, as the plaintiff, Sir Spencer, cannot obtain any benefit thereby. But in *Doherty* v. *Allman* (5) Lord Cairns pointed out that in the case of a negative covenant the Court would have no discretion to exercise, but would grant an injunction, by way of specific performance, to enforce the

(1) [1896] A. C. 434.
(2) [1899] 1 Ch. 474.
(3) (1880) 14 Ch. D. 785.
(4) (1910) 27 Times L. R. 170.
(5) (1878) 3 App. Cas. 709, 719.

contract between the parties. It seems however to have been suggested that there would be a discretion, where the covenant was only enforceable in equity: *Elliston* v. *Reacher* (1); *Osborne* v. *Bradley*. (2) At the highest it amounts to this, that the fact that there is a direct contract between the parties gives a better right to an injunction. The Court must grant an injunction as between the original covenantee and covenantor, but would have a discretion not to do so against an assign, where the covenant was purely capricious and its enforcement could not benefit the covenantee: see however *Lord Northbourne* v. *Johnston & Son*. (3) It is suggested that the question whether the person seeking to enforce the covenant will be damnified by breach of it is not a matter for the Court to consider in deciding whether an injunction to restrain the breach should be granted. The covenants were not taken here capriciously for the benefit of Fitzjohn's Avenue, but to enable the covenantee to enforce them for the benefit of the surrounding residents, and he was in the position really of holding the benefit of the covenant on trust for them. This does not involve a building scheme: *Roper* v. *Williams*. (4)

[TOMLIN J. Unless there is a building scheme, I fail to see how any moral obligation of Sir Spencer to the residents can enter into the matter. *Roper* v. *Williams* (4) must have been a case of a building scheme.]

It is contended that the fact that Sir Spencer was under such a moral obligation would be a ground for granting an injunction and not relegating him to his remedy in damages. The Court must have regard to all the facts in considering whether it will exercise its discretion by granting an injunction: see also *Peek* v. *Matthews* (5) and *Sobey* v. *Sainsbury*. (6)

Again the result of the building agreement dated May 14, 1877, and the conveyances thereunder in model form to the Kellys and their sub-purchasers is to create a building scheme enforceable by holders of the property acquired from Sir

(1) [1908] 2 Ch. 374, 395.
(2) [1903] 2 Ch. 446, 451.
(3) [1922] 2 Ch. 309, 318, 319.
(4) (1822) T. & R. 18.
(5) (1867) L. R. 3 Eq. 515.
(6) [1913] 2 Ch. 513.

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Spencer under that agreement inter se. The estate which was the subject of the building agreement was thereby subjected to a general law—namely, the restrictions imposed by the agreement. Further the agreement showed on the face of it that the development of the estate was intended to be by way of distribution.

[TOMLIN J. The form of conveyance by Sir Spencer direct to a sub-purchaser contains nothing to tell him that the estate of which he is buying a portion is subject to a general law.]

A sub-purchaser from Kelly who took a conveyance direct from Sir Spencer had constructive notice of the building agreement, if he did not actually see it. The agreement was the only title that the Kellys had to enable them to sell to him and it was therefore a necessary document of title: see *In re Hucklesby and Atkinson's Contract.* (1)

It follows that the Kellys and the sub-purchasers taking direct from Sir Spencer all knew that a certain area was subject to a defined mode of development and to definite restrictions; that was enough to constitute a valid building scheme. It is immaterial whether subsequent purchasers actually knew of this: they must all take with constructive notice of the scheme: *Elliston* v. *Reacher.* (2) Thereafter Sir Spencer would have no power to vary the restrictions, because others had bought on the faith of this common law being applied to the whole estate and all the ingredients of a building scheme are present: *Roper* v. *Williams* (3); *Peek* v. *Matthews* (4); *Spicer* v. *Martin* (5); *Renals* v. *Cowlishaw* (6); *Elliston* v. *Reacher* (2); *Reid* v. *Bickerstaff* (7); *Sobey* v. *Sainsbury.* (8)

A. Grant K.C. and *Swords* for the defendant. As regards the claim by the second defendant to enforce the covenants, irrespective of the existence of a building scheme, it is contended that as matter of construction the benefit of the restrictive covenants was never properly annexed to

(1) (1910) 102 L. T. 214.
(2) [1908] 2 Ch. 374, 384.
(3) T. & R. 18.
(4) L. R. 3 Eq. 515.
(5) (1888) 14 App. Cas. 12, 24.
(6) (1878) 9 Ch. D. 125, 129.
(7) [1909] 2 Ch. 305.
(8) [1913] 2 Ch. 513.

Fitzjohn's Avenue. But if there was an annexation, then it is ineffective in law, because the benefit of a covenant cannot inhere in land unless it is advantageous to the land and affects its mode of occupation or value: *London County Council* v. *Allen* (1); *Rogers* v. *Hosegood*. (2) The land must be capable of enjoying it. Thus there can be no easement binding a servient tenement unless the dominant tenant is benefited by it: Gale on Easements, 9th ed., p. 17. *Ackroyd* v. *Smith* (3) decides that a restrictive covenant unconnected with the enjoyment or occupation of land cannot be enforced against an assign of the covenantor, because the benefit of it does not inhere in the land: see also *Attorney-General* v. *Horner* (4); *Bailey* v. *Stephens* (5); *Keppell* v. *Bailey*. (6) Here it was attempted to annex the benefit of the covenant to Fitzjohn's Avenue after it had been dedicated to the public. These were circumstances in which it was immaterial to Sir Spencer as owner of the soil of the road what happened on the surrounding property. The road qua road could not be benefited—that is, increased in value. The covenant was therefore personal to Sir Spencer and did not pass to the second plaintiff. But even if the benefit of the covenant inhered in the road originally, such rights as the owner had in the road were extinguished when it was taken over by the local authority in 1882: *Battersea Vestry* v. *County of London, &c., Co.* (7)

Again even if the benefit of the covenant still inhered in the road it is impossible to suggest that a breach of the covenant would cause any damage to the second plaintiff in respect of his interest in the site of the road, and, that being so, no injunction ought to be granted in his favour: *Sharp* v. *Harrison*. (8) *Doherty* v. *Allman* (9) related to a lease, and the statement of Lord Cairns in that case must be read in connection with that subject matter.

Secondly, there is here no building scheme. It is an

(1) [1914] 3 K. B. 642, 647.
(2) [1900] 2 Ch. 388, 394, 395.
(3) (1850) 10 C. B. 164, 184.
(4) [1913] 2 Ch. 140, 196.
(5) (1862) 12 C. B. (N. S.) 91, 108.
(6) (1834) 2 Myl. & K. 517.
(7) [1899] 1 Ch. 474.
(8) [1922] 1 Ch. 502.
(9) 3 App. Cas. 709.

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essential element of a building scheme that the area to be affected by it should be divided into plots. Here the Kellys were left under the building agreement free to split up the land as they liked. They might have built one house or 150 houses on the property. There was no plotting of the whole area either then or at any time afterwards. Until the last piece of ground was disposed of no purchaser could know how many plots there were to be. A dividing up of the area into plots, so that each purchaser may know to how many different owners he will ultimately incur liability for any breach of covenant, is essential to a building scheme: *Osborne* v. *Bradley* (1); *Elliston* v. *Reacher* (2); *Spicer* v. *Martin* (3); *Reid* v. *Bickerstaff*. (4) Further the sub-purchasers from Sir Spencer did not have constructive notice of the building agreement. A sub-purchaser can require his vendor to show his title, but he need not do so, but can rely on receiving his title direct from his vendor's vendor: Williams on Vendor and Purchaser, 3rd ed., p. 580. The sub-purchaser, therefore, who abstains from requiring the vendor's title to be adduced does not get constructive notice of it.

Greene K.C. in reply. There is no basis for the suggestion that in order that the benefit of a covenant may be annexed to land the covenant must affect the mode of occupation of the land or its value. *Ackroyd* v. *Smith* (5) affords no support for this contention. It is not the land that enjoys the right, but the owner of the land in virtue of his ownership of it. The right, or in the case of an easement the easement, must be capable of enjoyment by the owner of the dominant tenement: *Bailey* v. *Stephens*. (6) The passage referred to in *Rogers* v. *Hosegood* (7), where Farwell J. said, "Adopting the definition of Bayley J. in *Congleton Corporation* v. *Pattison* (8), the covenant must either affect the land as regards mode of occupation, or it must be such as per se

(1) [1903] 2 Ch. 446, 453.
(2) [1908] 2 Ch. 374.
(3) 14 App. Cas. 12.
(4) [1909] 2 Ch. 305, 323.
(5) 10 C. B. 164, 184.
(6) 12 C. B. (N. S.) 91.
(7) [1900] 2 Ch. 388, 395.
(8) (1808) 10 East, 130, 135.

. . . . affects the value of the land," really refers to the burden and not the benefit of the covenant: see *Congleton Corporation* v. *Pattison.* (1) Analogous cases like easements must not be forced too far. The law of restrictive covenants stands by itself. Again the fact that there had been a dedication of Fitzjohn's Avenue makes no difference. The person dedicating retains all the rights of ownership, except that he must not obstruct the passage of the public: Halsbury's Laws of England, vol. xvi., p. 55. Further the right to an injunction to enforce a restrictive covenant does not depend on the breach causing damage: *Elliston* v. *Reacher* (2); *Richards* v. *Revitt* (3); *Osborne* v. *Bradley* (4); *Lord Northbourne* v. *Johnston & Son.* (5)

For reasons already stated all sub-purchasers from the Kellys had constructive notice of the building agreement. The sub-vendor's title to sell is part of the title on the sale: Williams on Vendor and Purchaser, 3rd ed., pp. 150, 153, 195, 580. Lastly there was sufficient here to create a building scheme. A purchaser need not know the number of plots, it is sufficient that he should know that there is a specific area, of which the land he is buying forms part, which is subject to a common law.

Cur. adv. vult.

1923. Dec. 21. TOMLIN J. delivered a written judgment, in which, after stating the facts substantially as above, he continued: The plaintiffs have framed their case in three ways: First, on behalf of the plaintiff Kelly it is said that the dealings by the Kellys with the land which they bought from Sir Spencer were such as to constitute a scheme under which all the purchasers from them intended to contract with them and with each other to abide by the various stipulations which were imposed on the sub-sale. In the course of the trial it became evident, and was in effect admitted, that the evidence was not sufficient to support this

(1) 10 East, 130, 135.
(2) [1908] 2 Ch. 374, 395.
(3) (1877) 7 Ch. D. 224.
(4) [1903] 2 Ch. 446, 452.
(5) [1922] 2 Ch. 309, 319.

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case. It did not appear that the estate was ever laid out in plots as part of a definite scheme, or that the attention of any purchaser was ever called to the existence of a condition of things which would justify the inference that mutual obligations were intended to be imposed: see *Elliston* v. *Reacher*. (1) This view of the case cannot, therefore, be supported.

Secondly, it is said that each of the sub-purchasers who took a conveyance directly from Sir Spencer had constructive notice of the agreement of May 14, 1877, and that notice of that agreement taken with the form of the conveyance was sufficient material to enable me to infer the existence of a scheme whereby mutual covenants between such sub-purchasers and the Kellys were imposed. There was some discussion in the course of the trial as to whether this case had been sufficiently raised on the pleadings. I, however, allowed an amendment in order to make the point raised clear. Assuming, as I do without determining the point, that the sub-purchasers were affected with constructive notice as suggested, I do not think that any such scheme as alleged can be inferred. It is to be observed that from start to finish there is nothing to show either (1.) that the estate was ever intended to be laid out in defined plots, or (2.) that the Kellys were not free at any time after they had sold one or more plots to deal with the residue of the land in any way they pleased, provided they could get from Sir Spencer his consent to a variation of the original agreement. To give effect to this view of the case I should have to hold that each sub-purchaser was willing to make himself liable, not merely to Sir Spencer, but (to use the words of Farwell J. in *Osborne* v. *Bradley* (2)) "also to unknown persons indeterminate and indeterminable in number, in respect of plots of the particulars of which he knew nothing,—that he had entered blindly into a bargain of which he could not possibly know the particulars." There never has been, so far as I know, a case where upon such indefinite material a scheme

(1) [1908] 2 Ch. 374. (2) [1903] 2 Ch. 446, 454.

has been held to exist: compare *Reid* v. *Bickerstaff* (1), and I conclude that there was in fact no scheme.

Thirdly (and this is the purpose for which the plaintiff Sir Spencer Pocklington Maryon Maryon-Wilson was added as a plaintiff), it is said that the last-named plaintiff is entitled to enforce the covenants contained in the conveyances of May 11 and 14, 1880, against the defendant who has constructive notice of them. This part of the case raises points of some difficulty. It has been urged on behalf of the defendant that there never was or could be any legitimate annexation of the benefit of the covenants to the site and soil of Fitzjohn's Avenue retained by the original covenantee.

So far as concerns the construction of the conveyances in question, it is plain that there was such an annexation as, if operative, would bring the case within the second class of case mentioned by Farwell J. in *Osborne* v. *Bradley*. (2)

For the purpose of considering the validity of the attempted annexation of the benefit of the covenant to the site and soil of the road, it is not, I think, necessary to determine the precise juridical foundation of the doctrine under which restrictive covenants are enforceable as running as to burden and benefit with the land: see Sir George Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm* (3) and *Rogers* v. *Hosegood*. (4) It is enough to say that whether the efficacy of these covenants is due to an extension of the doctrine of *Spencer's Case* (5) or to their falling within the category of easements, it is an essential of effectual annexation of the benefit that they should touch or concern the land. It is plain, for example, that the benefit of a right of way over or of a covenant restrictive of the user of land in Clapham cannot be annexed to land, say, at Hampstead, and there may be cases where, either by reason of the situation of the land intended to be burdened, or otherwise, there is a difficulty in determining whether the restriction or easement sought to be imposed touches or concerns the land intended to be

(1) [1909] 2 Ch. 305.
(2) [1903] 2 Ch. 446, 450.
(3) (1882) 20 Ch. D. 562, 583.
(4) [1900] 2 Ch. 388.
(5) (1583) 5 Rep. 16A.

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benefited. Whatever the true test may be, it is not, in my opinion, as urged by Mr. Grant, the test of increased value. I see no reason why there should not be an effectual annexation to land owned by the covenantee, subject to a public right of way, of the benefit of a covenant restricting the user of adjoining land, so as to secure a particular character to the land subject to the public right of way. I think, therefore, that there was originally an effectual annexation to the site and soil of Fitzjohn's Avenue of the benefit of the restrictive covenants in the conveyances of May 11 and May 14, 1880.

The question, however, still remains whether now the covenants can be or ought to be enforced by injunction at the instance of the successor in title of Sir Spencer against the successor in title of the Kellys.

First, it is to be observed that the interest of the plaintiff Sir Spencer Pocklington Maryon Maryon-Wilson in the avenue is not the original interest of his predecessor. It is admitted that the taking over of the road by the local authority, whether it was under the Metropolis Management Act, 1855, or under the Public Health Act, 1875 (and it was done under one or other of these Acts), vested in the local authority so much of the actual soil of the avenue as might be necessary for the purpose of preserving, maintaining, and using it as a street: see *Tunbridge Wells Corporation* v. *Baird* (1) and *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co.* (2); so that Sir Spencer's successor cannot to-day show that the surface of the avenue is vested in him, or that he sues to-day in respect of the estate or interest which belonged to his predecessor, or that the restrictions touch or concern such land as he now has. I do not think, therefore, that Sir Spencer's successor can maintain the action.

Secondly, it is admitted that no damage can be proved to Sir Spencer's successor by what is being done. His introduction as plaintiff at a late stage into a case in which he has no real interest was only to make use of him and his

(1) [1896] A. C. 434. (2) [1899] 1 Ch. 474.

claim as tabula in naufragio. Further, the breach complained of, though technically admitted to be a breach, is not of a kind which is proved or alleged to have caused any nuisance or annoyance or indeed to be observable except by some investigation of what goes on inside the houses. C. A. 1924 KELLY v. BARRETT. Tomlin J.

Even if, therefore, I am wrong in what I have already said as to the enforceability of the covenant, ought an injunction to be granted in the circumstances? I think not. Whether or not proof of damage is essential, I think that in this class of case, where there is no privity of contract, the Court has the right, and is bound, to exercise a judicial discretion with regard to granting an injunction: see *Doherty* v. *Allman* (1) and *Osborne* v. *Bradley* (2); and to grant an injunction here would, in my opinion, go beyond anything that has been done in any reported case, and be oppressive, and it being clear that there is no damage I do not think that damages in lieu of an injunction ought to be awarded.

I think, therefore, that the action fails under all heads, and must be dismissed with costs.

H. C. G.

The plaintiffs appealed. The appeal was heard on May 13, 14 and 15, 1924. C. A.

Greene K.C. and *Baden Fuller* for the appellants substantially repeated the arguments used by them in the Court below.

A. Grant K.C. and *Swords* for the respondent were not called upon.

May 15. POLLOCK M.R. This is an appeal from a decision of Tomlin J., who dismissed the action.

The action is brought by the plaintiffs to establish as against the defendant a right to insist upon user by the defendant of the houses Nos. 40 and 42 Fitzjohn's Avenue, of which she is now the owner, solely as private residences, under the equitable doctrine that the covenant which was made in respect of the land originally comprised in an agreement

(1) 3 App. Cas. 709. (2) [1903] 2 Ch. 446.

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of May 14, 1877, is binding upon her and can be enforced by the plaintiffs in the present action. It is not suggested that there is any right at law. It is suggested that there is a right as against the defendant on the ground that the equity may be enforced against her as one of the purchasers with notice of the covenant, which attached to the premises that she occupies, that those premises are to be occupied for the purposes of a private house only.

Before Tomlin J. an attempt was made to establish that there was in fact and there could be proved to be a building scheme, and that the dealings by the Kellys with the land were such as to constitute a scheme under which all the purchasers from them intended to contract with them and with each other to abide by various stipulations which were imposed on the sub-sale. That claim failed for want of sufficient evidence to support it, and counsel for the appellants agrees that he cannot carry it further.

The second claim, however, is one upon which the learned judge also decided against the plaintiffs, and it is upon that second claim that the plaintiffs appeal to this Court. The facts have been clearly and sufficiently stated by Tomlin J., but the point that we have to consider is whether or not the present plaintiffs are entitled to enforce as against the defendant their right in equity to restrain her from using her premises otherwise than as a private residence on the ground that she had notice of the above-mentioned covenant, and whether the plaintiffs are entitled to enforce that covenant as against her; or, as the learned judge accurately puts it, whether the defendant, one of the sub-purchasers who took a conveyance, had constructive notice of the agreement of May 14, 1877, and whether that notice of the agreement, taken with the form of the conveyance, was material upon which the learned judge should infer the existence of a scheme whereby mutual covenants between sub-purchasers and the Kellys were imposed. It is clear that in order to enforce this doctrine as against the sub-purchaser on the ground that she has notice, proof must be given that she took the land with notice of the covenant, either actual or

constructive. It is said here that there was a scheme of which the defendant had notice and by which she is bound. Counsel for the appellants first endeavoured to establish that he need not indicate in a case of this nature by the actual terms of the documents which the parties have entered into that there was such a scheme. He said that it would be sufficient if it were found from the surrounding circumstances that the scheme had been entered into. He puts it as it was put by Joyce J. in *Reid* v. *Bickerstaff* (1), that it is not necessary to find any express contract by the vendor or the several purchasers; it may be collected or inferred from the nature of the transaction. I think he is right in claiming that there may be a scheme which is collected or inferred from the nature of the transaction. That is not more than carrying out the principle enunciated by Wills J. in *Nottingham Patent Brick and Tile Co.* v. *Butler* (2), where he says: "It is in all cases a question of intention at the time when the partition of the land took place, to be gathered, as every other question of fact, from any circumstances which can throw light upon what the intention was." Therefore, if there was or is evidence from which a scheme can be found to exist it does not fail because it is not to be found in express terms, if it can be collected from the nature of the transactions and the relevant facts.

Counsel for the appellants contends that in the present case the proper inference is that there was a scheme, and he puts his case in this way. He says there was the original agreement of 1877 entered into between the Kellys and Sir Spencer Maryon-Wilson, and he has pointed out to us that there were to be two forms, either of which was to be adopted when the land was to be conveyed in consequence of that agreement by Sir Spencer Maryon-Wilson to the Kellys according as the buildings intended to be placed upon the sites had been completed or not. However that may be, it is perhaps important to observe that the agreement of 1877 did contain a dispensing power on the part of Sir Spencer Maryon-Wilson from the agreement which the Kellys had

(1) [1909] 2 Ch. 305. (2) (1885) 15 Q. B. D. 261, 269.

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entered into. The two houses which are occupied by the defendant passed through the Kellys to Horner and to Harris respectively, and so came into the possession of the defendant. Those deeds have been sufficiently stated by the learned judge. There is in those deeds no dispensing power which existed in 1877, and it is doubtful whether there is any reference to, or any notice of, the deed of 1877 which would make it essential that an inquiry should be made as to its actual terms. Quite apart from that, the question is, was there a scheme? There are three or four cases which at the present time show exactly what is to be found, if a scheme is to be inferred. I need not refer back to the statement of the law in *Renals* v. *Cowlishaw* (1) nor to *Spicer* v. *Martin*. (2) *Spicer* v. *Martin* (2) accepts the statement of the law in *Renals* v. *Cowlishaw* (1), although it points out that the doctrines there laid down are not to be extended. I observe that in *Spicer* v. *Martin* (2) it is stated by Lord Macnaghten, in reference to the particular group of houses which were in question in that case, that they had actually been built as private houses and offered to the public as such, and their character was unmistakable. After those two cases the same point arose in *Rogers* v. *Hosegood*. (3) Collins L.J. in delivering the judgment of the Court stated the law in this way: "These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought." Then in *Elliston* v. *Reacher* (4) Parker J. laid down the four conditions which had to be fulfilled, and I will read the first two of them. He said: "It must be proved"—if a scheme is to be inferred—"(1.) that both the plaintiffs and defendants derive title under a common

(1) 9 Ch. D. 125; 11 Ch. D. 866.
(2) 14 App. Cas. 12.
(3) [1900] 2 Ch. 388, 407.
(4) [1908] 2 Ch. 374, 384.

vendor; (2.) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development." In subsequent cases, and in particular, I think, in *Reid* v. *Bickerstaff* (1), there has been superadded to that a little more, and that is, that it is now said that there must be a defined area. Cozens-Hardy M.R. puts it in this way, that the lots were intended to be defined, and that the persons on whom the burden of this covenant was imposed were to have some sort of knowledge of the persons or range of persons to whom their responsibility existed. That appears definitely from *Reid* v. *Bickerstaff* (1), but I am content to take the law stated by Parker J. in *Elliston* v. *Reacher* (2), and to apply to the present case the test which he has enunciated in the second condition which he laid down. For my part I cannot find that the facts of the present case fulfil that condition. I do not see in the facts before us that there was ever a laying out of the estate by Sir Spencer Maryon Wilson such as would fulfil this second test. It is true that in the agreement of 1877 there was a provision that certain houses, if built, should not be of a less money value, but there is no definite laying down of the number of houses to be built, and although certain boundary fences are to be of a uniform nature with some others, and there is a provision that the building shall not approach the frontage wall within a certain distance, and the like, a general system of laying out appears to be absent. There does not appear to be sufficient detail or finality in the system which was to prevail throughout the scheme, and I cannot find, even taking at their highest the conditions which were laid down in the agreement of 1877, that those details were "consistent and consistent only with some general scheme of development."

(1) [1909] 2 Ch. 305. (2) [1908] 2 Ch. 374, 384.

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This point becomes even clearer when you see what happened after or in the course of the passage of these sites into the hands that at present hold them. It is quite clear that, in order to enforce the doctrine now advanced on behalf of the plaintiffs, proof must be given that the sub-purchaser took the land with notice of the covenant either actual or constructive, and that there must also be a mutuality between the persons who are to be bound by, and who are entitled to enforce, the contract. Looking back at what passed between Sir Spencer Maryon-Wilson and the Kellys, I cannot find that there was a mutuality which justified the inference that it was intended by Sir Spencer Maryon-Wilson that there should be a definite building scheme binding upon those who ultimately occupied these premises. It is at that point on the second condition that I think the plaintiffs' case really fails. It has been argued for the appellants that a general inference ought to be drawn in favour of a building scheme on the ground that there would be an enhanced value in the subsequent conditions which are laid down by Parker J., but it seems to me that there is no system of reciprocal rights —no original laying out of a scheme—and that upon the whole, therefore, no just inference can be drawn that there was a scheme in existence by which the parties are bound. I have added a word or two to what Tomlin J. has said, but I am really content to accept his judgment upon this second point as correct, and I do not desire to add more, except to say that for the reasons which he has given, as well as for those which I have given, the plaintiffs' claim under this second head fails.

The third point is wholly different. It is said, quite apart from the question of any scheme, that Sir Spencer Pocklington Maryon-Wilson is entitled to enforce the covenants contained in the conveyances which are a part of the title of the defendant, on the ground that a covenant was made directly with his predecessor in title—namely, his father—and that he, as the assign of his father, is entitled to enforce that covenant.

Now he could enforce it only if he had some interest to

which the liability of the covenant could be attached, and the learned judge has found that although in the first instance his father would have had sufficient interest to enable him to sue, the present plaintiff, Sir Spencer's successor, cannot show to-day that the surface of the avenue is vested in him or that he sues to-day in respect of the estate or interest which belonged to his predecessor. I do not wish to repeat the facts which have been stated by Tomlin J., but it is important to observe what the present plaintiff has. He has an interest in the subsoil of the streets, which were originally a part of the estate of his father. Those streets have been taken over by and are now vested in the local authority. Sir Spencer Maryon-Wilson, therefore, although he has a proprietorship in the subsoil, has no interest in the surface, and no interest in such part of the immediate subsoil as it is necessary for the local authority to hold for the purpose of sewerage, lighting and other purposes. The covenants that were taken from the Kellys were covenants which were attached to Sir Spencer Maryon-Wilson in his right as the owner of these ways. I call them "ways," because at that time they had not been taken over by the local authority, but since that time the local authority have acquired their interest in them as streets, and all that is left is the interest which the present Sir Spencer Maryon-Wilson may have, if it is conceivable that they should cease to be streets, that all the sewering and lighting should be swept away, and that the fee should once again revert to the owner of the land.

It is agreed that for the purpose of enforcing covenants against the defendant it is necessary that those covenants should be attached to some land, and have some connection with it, in the sense of an interest which unites the two pieces of land, but at the present moment all that Sir Spencer Maryon-Wilson has is an interest in the subsoil. It is admitted that it would be impossible to attach the right to enforce the covenant to land, let us say, at Clapham, on the ground that it would be too remote and there would be no unity of interest whatever between the two pieces of land. I ask myself the question then: Is the interest which Sir Spencer

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at the present time has, subject to the rights of the local authority, anything like a sufficient interest to enable him at the present time to enforce these restrictive covenants? It seems to me by parity of reasoning with the decision which says that land at Clapham would be too remote and unable to carry a right to enforce the covenants in respect of this land at Hampstead, so too the interest which at present Sir Spencer has in the subsoil is of the same nature and is too remote and cannot carry with it the right which it is now sought to enforce, and that these restrictions which it is sought to enforce do not touch or concern the interest in the land such as he now has. I think, therefore, that Tomlin J. is quite right in saying that the present Sir Spencer cannot maintain the action.

With regard to the last point—namely, whether the fact that no damage can be proved militates against Sir Spencer's right to enforce the covenant—I do not desire to say anything. I certainly do not put my judgment on that ground, because the cases which have been called to our attention on behalf of the appellants indicate that the question of damage is not a cardinal point on which the remedy rests, and that even if no actual monetary damage can be proved, yet if there is a right to enforce the covenant, the covenant can be enforced even in cases where it would be difficult or perhaps impossible to estimate that there had been any monetary damage, but I do not desire to say anything upon that ground. It is sufficient to base my judgment upon the same ground as that on which the learned judge has based his judgment on this third point in the case, that he finds, as I find, that the restrictions do not touch or concern such interest in the land as he now has, and therefore that Sir Spencer's interest is not sufficient to enable him to enforce the covenants as against the present defendant.

I think, therefore, that for these reasons the appeal should be dismissed with costs.

WARRINGTON L.J. The plaintiff, Mr. Edward Kelly, is the owner of certain plots of land with houses thereon standing

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some on one side and some on the other side of Fitzjohn's Avenue. The defendant is the owner of two plots with semi-detached houses thereon, also in Fitzjohn's Avenue. The plaintiff, Mr. Edward Kelly, seeks to enforce against the defendant an obligation entered into by a predecessor in title of the defendant to use his houses as private houses only. The plaintiff, Sir Spencer Pocklington Maryon-Wilson, is the successor in interest of Sir Spencer Maryon-Wilson, who, before the events which have given rise to this action, was the owner of very considerable property at Hampstead, including the sites of the other plaintiff's and the defendant's residences, and in fact of all the houses on both sides of Fitzjohn's Avenue.

The case made by the plaintiff against the defendant was founded upon the suggestion of the existence of a building scheme. Now what is the meaning of that? Stated shortly it means this, that a piece of land divided into plots for sale has been so disposed of or dealt with that the purchaser of each of those plots and his successors in title, are, as against the other purchasers, entitled in equity to a quasi-negative easement, the effect of which is to prevent those other purchasers from using those plots except in accordance with certain restrictions, and that in like manner his land is subject itself to a corresponding negative easement to the benefit of which the purchasers of all other plots are entitled. Stated quite shortly I think it is essential that the land, over the separate plots of which it is said that the reciprocal rights and liabilities extend, should, when the scheme is created, be divided into plots, so that each owner may know what are the lands which in his favour are subject to the restrictions in question and who are the owners who can enforce such restrictions against him; I do not mean who are the owners by name, but who are the persons by reference to the lands they hold who can enforce those restrictions against him. That that is the position I think is sufficiently shown by the very well-known description of the essentials of a building scheme stated by Parker J. in *Elliston* v. *Reacher*. (1) I will repeat

(1) [1908] 2 Ch. 374, 384.

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the four essentials which he there mentions: "It must be proved (1.) that both the plaintiffs and defendants derive title under a common vendor; (2.)"—this is important—"that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in detail as to particular lots, are consistent and consistent only with some general scheme of development; (3.) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors." I will only add a passage from the judgment of Farwell J. in *Osborne* v. *Bradley* (1), which to my mind shows that the allocation in lots referred to by Parker J. is to be taken literally in the terms in which he has expressed it. Farwell J. says: "Nor would it be reasonable for me to draw the inference that a number of persons, or any one person coming in and buying intend or intends to be bound to an unknown number of unknown persons in respect of an estate which, so far as it has been sold, is undefined, and to undertake liabilities to them and to accept a corresponding benefit from them. Neither the persons, nor the estate, nor the lots in respect of which these covenants are entered into or undertaken are in any way stated. If it was intended that the vendor should himself be bound, he would of course have entered into the covenant himself. The whole theory of these interdependent covenants appears to me to point to an arrangement made

(1) [1903] 2 Ch. 446, 453.

once for all, either on a sale by auction, by conditions of sale stating the covenants and that other persons will enter into similar covenants, and a plan exhibited at the sale, or by a scheme entered into already by antecedent sales, the particulars of which are stated to the purchaser, and which are displayed upon a plan drawn upon the purchaser's deed." It seems to me, therefore, essential if you are going to create reciprocal rights that you must specify what are the parcels of land which are to enjoy those reciprocal rights.

Let us see what has happened in the present case. As I have said, Sir Spencer Maryon-Wilson in and prior to 1877 was the owner of a considerable area of land in Hampstead, and he had previously constructed a road, which is now called —and which was called in 1877, although it then had no houses upon it—Fitzjohn's Avenue. He had also made preparations for building on either side of Fitzjohn's Avenue by constructing a sewer under the road, and he had dedicated the road to the public, but it had not been taken over and it was not at that time a street within the meaning either of the Public Health Act of 1875 or the Metropolis Management Act of 1855. On May 14, 1877, he had entered into an agreement with the two Kellys, the survivor of whom is the present plaintiff, Mr. Edward Kelly. The general effect of the agreement was, that he agreed to sell to the Kellys, for 39,000*l.*, two strips of land on either side of Fitzjohn's Avenue. The land was shown on the plan simply in blocks, as it was divided by the cross roads, but without any division into lots. It was shown simply as pieces of land bounded by roads on certain sides and by other land on other sides, but not in any way internally divided. The purchaser agreed to build houses on this plot of land. The number was not specified; no provision was made as to the size, either minimum, maximum or otherwise, of the plots into which it was to be divided; no stipulation was made, beyond the amount of money that was to be spent on the houses, as to what was to be the nature of them. The only restriction besides the amount of money to be spent was that the front elevation—and where the house adjoined a side road the side elevation

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also—should be approved by the vendor's surveyor. Except in those particulars there was nothing in the deed to define the nature of the supposed scheme which is now relied upon, but it is true that Sir Spencer Maryon-Wilson took from the Kellys a stipulation in the agreement that the houses to be built should be used as private residences only. As I have pointed out, those houses, so far as this agreement is concerned, might have been fifty, hundred, twenty, or a dozen, whatever numbers the Kellys might choose to select. It was left entirely to them to carry out the details of what no doubt with them was a building speculation. The Kellys had power under the agreement to take conveyances under certain terms of portions of the land. The form in which the conveyances should be taken was fixed at the date of the agreement by reference to a draft which had been prepared and which is referred to in the document, and that was in an alternative form. In one of the two forms the agreement of 1877 was referred to; in the other all reference to it was excluded. I think fifty-two houses have been built upon the plots of land comprised in that agreement; certainly fifty-two houses have been sold. Twenty-eight were conveyed to the Kellys, and twenty-four were by the Kelly's directions conveyed to sub-purchasers. Whether there is much difference between the two, so far as the law is concerned, I doubt. The defendants' two houses are included in the twenty-eight, the conveyances of which were made to the Kellys themselves. The first of those conveyances is dated May 11, 1880. It is sufficient to refer to that one, because the others are in exactly the same form. The first thing to notice about that is that it is a conveyance of a single plot of land. There is no reference in the conveyance to any other land. For anything that appears on the face of the conveyance it was the only plot of land which the Kellys had in the neighbourhood. The recital is that Sir Spencer Maryon-Wilson was seised of the land, that he agreed to sell the land granted to the Kellys, and that the Kellys had agreed to enter into the covenants in the deed contained. Then there is simply a conveyance by Sir Spencer Maryon-Wilson to the Kellys of that plot of land,

and there is a covenant in the deed by the two Kellys with Sir Spencer Maryon-Wilson, his heirs and assigns, "owners for the time being of the site and soil of Fitzjohn's Avenue aforesaid in manner following." Then, amongst other things, they covenant that "no messuage for the time being erected on the said piece of land shall be used for any purpose other than that of a private residence And that no stabling now erected or which shall be for the time being on the said piece of land shall be used as a public livery or job horse stable—or otherwise than for private use." That is simply a conveyance of one plot without reference to any other land, and when you look at the plan which is on the conveyance the plot is coloured pink. Mr. Farmiloe is stated to be the owner of the land to the south of it; Messrs. Kelly are stated to be the owners of a strip immediately to the north. Those are the two pieces bounding that piece of land, and nothing is said as to the ownership of the surrounding land. The conveyance of the other plot is exactly the same, except that as it is further to the north the owner of the land lying to the north is "C. A. Barton, Esq.," and the owner of the land lying to the south is "Messrs. H. E. Kelly"—namely, the owners of that bit which I have already mentioned. Those two plots were sold by Messrs. Kelly, the one to a gentleman named Horner and the other to a gentleman named Harris, and they have recently been purchased by the defendant.

In my opinion, there is no evidence here from which it is possible to infer an intention to create these reciprocal rights, for the reason to which I have already alluded, that Sir Spencer Maryon-Wilson, the common vendor from whom both plaintiff and defendant derive title, had not sold the property in lots and created a scheme which was to apply to the purchasers of all the lots within the statement of the essentials of such a scheme as described by Farwell J. The utmost that can be said about it is that the agreement between Sir Spencer Maryon-Wilson and the Kellys contemplated the building of a number of houses which were to be private houses, and that they were to be kept as private houses, and that it was enough to make a sufficient building

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scheme if the details were left to be settled by Messrs. Kelly, the purchasers. To accede to the plaintiff's claim would, in my opinion, be to extend the principle upon which the Court has already acted in these cases, and which Lord Macnaghten has told us in *Spicer* v. *Martin* (1) is not to be extended. The principle gives rise, even as it stands, to a somewhat anomalous position, that a man who has made no bargain with a particular person is liable to be sued by that person and to have enforced against him an obligation into which he has not entered, either in fact or with the person who is seeking to enforce it against him or at all, but an obligation by which he is bound by the application of the equitable principles to which I have already referred. So much for the main question in the action.

The next question arises in the following way. The present Sir Spencer Maryon-Wilson has been added as plaintiff in the action, and it is contended that he, at all events, as the representative of the original covenantee, is entitled to enforce his covenant against the defendant. It is admitted that he could not sue the defendant at common law, that all he can do is to enforce this obligation on equitable principles as one entered into for the benefit of certain lands retained by the present Sir Spencer Maryon-Wilson's predecessor in title, of which land he is now the possessor. The covenant in the deed of conveyance is made with "Sir Spencer Maryon Maryon-Wilson, his heirs and assigns owners for the time being of the site and soil of Fitzjohn's Avenue." Two questions have been raised. It is said there was at that date the site and soil of Fitzjohn's Avenue, property to which it was possible, for the purposes of such cases as we are dealing with, to annex the benefit of such an obligation, and secondly it is said that even if it were so annexed, the land to which the present Sir Spencer Maryon-Wilson is entitled is not that to which the benefit of the covenant was attached. With regard to the first point Tomlin J. has held that the site and soil of the road was land to which the benefit might in law be attached, and I take it that the question which has to be

(1) 14 App. Cas. 12.

determined in all such cases is: May the land to which the benefit purports to be attached be reasonably regarded as capable of being affected by the performance or the breach of the obligation in question, as the case may be? I am not prepared to differ from Tomlin J. on this point. I think it may be that a reasonable person could come to the conclusion that Sir Spencer Maryon-Wilson as the owner, as he then was, of that strip of land which is called the site and soil of Fitzjohn's Avenue, might be affected by the performance or non-performance of the obligation; that may be so, but that land is in this position. It was land which had been laid out as a road. Building on either side of it was contemplated, and accordingly at any time it might become a street liable to be taken over by the local authority and to vest in that local authority. That is just what happened. On November 23, 1882, the road was formally taken over by the local authority, and thereupon the street vested in that local authority. We know what is meant by the vesting of the street. It means that the soil of the road which constitutes the street is vested in the local authority to the extent to which it is necessary that the authority should possess it in order to control the use of the street. In my opinion, so soon as that event took place—an event which must have been contemplated at the time when the arrangement was made—the street, so far as it remained vested in Sir Spencer Maryon-Wilson, was not land of such a nature that the obligation could properly be attached to it, and therefore it seems to me that the present Sir Spencer Maryon-Wilson is not entitled to enforce that obligation, inasmuch as the land of which he is now possessed, after the exercise of their powers by the local authority, is not land to which the benefit of such a covenant could properly be attached. On that ground, which is substantially the same as that taken by Tomlin J., I think that the claim of the second plaintiff also fails.

With regard to the last passage in the judgment of Tomlin J., as to the discretion of the Court to give damages in lieu of an injunction, it is unnecessary to say more than that I am not satisfied, having regard to the authorities to which we

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have been referred by counsel for the appellants, that those remarks are justified. They were not essential to the judgment, and so far they are immaterial. I think the appeal fails.

SARGANT L.J. I am of the same opinion. The first and principal claim here is to enforce an alleged building scheme said to have been constituted by an agreement of May 14, 1877. On the face of it the agreement in question is one of a very familiar type under which portions of building estates are developed. It provides for the purchase of a considerable area of land and the expenditure on it by the builder of money in building houses in sections. It prescribes the value of the houses to be built and prohibits the erection of any but private houses. Then cl. 4 contains a provision which is essential for the practical carrying out of a building agreement—namely, that the builder can have conveyed to him portions of the property at an apportioned part of the purchase money, the object of course being to separate and individualise the rights in respect of these separate portions, and to enable them to be mortgaged and conveyed by the builders to third parties, subject only to the performance of an apportioned part of the liabilities under the agreement, and discharged from the general liabilities of the agreement, with reference to the rest of the property. There is attached to this agreement an alternative form of conveyance, and each alternative form of conveyance is carefully framed so as to avoid putting on the title the building agreement itself. It recites merely that there has been an agreement for sale, either subject to certain conditions which have not been performed down to the present time and the performance of which is to be continued in the conveyance, or that there has been an agreement for sale simpliciter, but there is no reference by date or parties to the particular agreement. I think, as I said in a recent case of *South Eastern Ry. Co.* v. *Cooper* (1), that that is carefully done in accordance with the practice of conveyancers to avoid putting on the title any

(1) [1924] 1 Ch. 211, 235.

definite reference to the antecedent agreement at all. Then it is to be noted that in either alternative form of conveyance the covenants—which include the covenant or obligation now said to have been violated—are covenants with Sir Spencer Maryon-Wilson and with him alone, and of course only in respect of the particular land conveyed.

Where here is there any indication of there being a building scheme at all as distinguished from an ordinary building agreement, a building scheme under which rights are to arise and to continue not merely between the purchasers and Sir Spencer Maryon-Wilson, but as between the purchasers themselves by way of mutual obligation? I cannot myself see any evidence of such an intention in this agreement. I do not think the agreement went, or was intended to go, beyond the provisions of a quite ordinary building agreement. Every provision of the agreement was one appropriate to the working out of a building agreement, and there is no provision, as far as I can see, which contemplates, either directly or indirectly, the formation of a building scheme enforceable between the several purchasers of houses built on the estate. Indeed there are indications to the contrary, such as the very careful form of conveyance under which the original agreement is scrupulously kept off the title, so that the only apparent obligation will in the future be an obligation to Sir Spencer Maryon-Wilson and his successors. That is a very strong indication indeed that it was not intended that there should be any building scheme. I may add that the configuration of the land itself seems to me to show how singularly ill adapted it was for the formation of a building scheme. It was only part of a considerable length of road called Fitzjohn's Avenue, and it was not throughout land on both sides of that avenue. As to part it was land on both sides of the avenue; as to the other part it was land on one side only.

Reference having been made to *Spicer* v. *Martin* (1), I think I ought to say this: I have procured the case that was lodged in the House of Lords, with, of course, prints of all the documents in that case, and I do not think *Spicer* v. *Martin* (1) can be

(1) 14 App. Cas. 12.

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fully appreciated without having before one the plan of the land with regard to which that decision was given. It is a piece of land so bounded and so carefully described as to be a kind of self-contained piece of land in a ring fence and it is all lotted out and carefully numbered 1 to 7, and the conveyance of each separate piece of land and of each separate house has on it, not, as is usual, the delineation of the site of that particular house alone, but a complete delineation of the whole of the seven houses. There are, quite apart from what appears in the printed report of the case, a great many indications to be derived from an observation of the plan; and that the documents themselves in *Spicer* v. *Martin* (1) show how very strong the physical indications, both of the property itself and of the plans on the documents, were in favour of there having been not merely a building agreement but a building scheme. But in the present case if we came to any other conclusion than that which I have stated, and held that this was not a mere building agreement but a building scheme, we should be introducing very great confusion into all or most of those ordinary building agreements where the builder can take his conveyances in portions and where similar covenants are to be entered into by each purchaser with the freeholder. In such cases the ordinary result of the working out of the agreement is that at the end of the agreement the intermediate builder has been eliminated, and ultimately there are a number of purchasers, each of whom is subject to the same obligations towards the original freeholder, but who are not subject and have never been intended to be subject, to any additional mutual obligations inter se, such as are ordinarily directly aimed at in a building scheme, but seem to me in this agreement to be as directly avoided. That is all I have to say on the first and main point here.

With regard to the second point, counsel for the appellants very frankly admitted that land to which the benefit of the covenant restricting the user of other land can be attached must be land the occupation or enjoyment of which

(1) 14 App. Cas. 12.

is liable to be affected by the prohibited user. After the road had been taken over by the local authority, and thereupon the surface of the road had become vested in the local authority, can it be said that the freehold of the land below that surface was land the occupation or enjoyment of which was liable to be affected by the prohibited user? There again counsel gave us a very frank answer. For on the assumption that at the date when the obligation was created the road had already been taken over by the local authority, so that at the time when the covenant was made the freeholder was not entitled to the surface but only entitled to the subjacent soil, counsel admitted that in that case the covenant could not effectively have been entered into, because the freeholder would not have had an interest in anything which would have been affected by the prohibited user. It seems to me to follow from that, that if the estate of the freeholder has been reduced to that which would not originally have supported the annexation of the benefit of the covenant, he has not left in him that which will now support the enforcement of the covenant. It is said that it was extremely hard that an Act of Parliament should take away rights which were never meant to be affected, but if the true view is that the right to enforce the covenant is annexed to land, the land is the principal and the right to enforce the covenant is the accessory, and if the principal becomes reduced so that it would not originally have supported the accessory, it seems to me that the result is that it can no longer support the accessory.

In my judgment, therefore, the judgment of Tomlin J. was right and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Linklaters & Paines.*
Solicitors for the respondents: *Scott, Bell & Co.*

G. A. S.

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[1923. A. 1043.]

Local Government—Public Library for two Parishes—Parishes subsequently merged in Metropolitan Borough—Closing of Library—Use of Building for administrative Purposes—Ultra vires—Injunction—Public Libraries Act, 1892 (55 & 56 *Vict. c.* 53), *ss.* 11, 12—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *s.* 4—*London* (*Adoptive Acts*) *Scheme*, 1900, *clauses* 2, 5—*City of Westminster* (*Adoptive Acts*) *Scheme*, 1902.

Premises were erected for use as a public library by the Libraries Commissioners of a parish, and later by arrangement the premises were used as a joint public library for that parish and a neighbouring parish under the Public Libraries Act, 1892. These parishes became merged in a metropolitan borough under the London Government Act, 1899, and the powers, duties, property and liabilities of the Libraries Commissioners for the two parishes were transferred to the borough council by the London (Adoptive Acts) Scheme, 1900. The council subsequently adopted the Libraries Acts for their entire area, and under the City of Westminster (Adoptive Acts) Scheme, 1902, these Acts were directed to be administered by the council uniformly throughout their area as a single library district. At the outbreak of war the library was closed and used for national purposes. It had remained closed ever since, except that for a time, as the result of protests by ratepayers, one floor was opened as a reference library. In 1920 the council decided to incorporate the library premises with their City Hall for use for administrative purposes, and up to the date of the writ in this action no alternative premises for the library had been procured, while the books of the library had been removed to other public libraries in the council's area. This action was brought by the Attorney-General on the relation of the vicar and rector respectively of the two parishes to prevent the proposed use of the library premises:—

Held, affirming the decision of Tomlin J. [1924] 1 Ch. 437, that it was ultra vires for the council to use the library premises for purposes other than that of a public library, such user not being authorized by the Public Libraries Act, 1892, s. 12; and that an injunction ought to be granted to restrain the unauthorized user.

Where the Attorney-General has exercised his discretion by issuing his fiat for the prosecution of an action against a public body to restrain an unauthorized exercise of its powers, the Court will not consider whether the action is one proper to be brought in the circumstances.

APPEAL from the decision of Tomlin J. (1), where the facts are fully stated.

In or about the year 1889 the parish of St. Martin-in-the-

(1) [1924] 1 Ch. 437.

Fields adopted the Public Libraries Acts, and pursuant thereto the Public Libraries Commissioners for the parish acquired a site in St. Martin's Lane and opened there a public library for the parish. In 1893 the parish of St. Paul, Covent Garden, adopted the Public Libraries Act, 1892, and came to an arrangement whereby the library at St. Martin's Lane was used as a joint library for the two parishes. By the London Government Act, 1899, the two parishes became included in the area of the defendants, and by cl. 2 of the London (Adoptive Acts) Scheme, 1900, the Commissioners for Public Libraries in any existing parish ceased to exist and their powers, duties, property and liabilities were transferred to the council of the metropolitan borough comprising that parish. By the City of Westminster (Adoptive Acts) Scheme, 1902, it was directed that the Public Libraries Acts, 1892 to 1901, should be administered by the defendants "uniformly throughout the parishes comprised in that city, and that it should form a single library district."

The library continued in use until the war, when it was closed and the premises used for national purposes by the defendants. Since then the library had remained closed, except between April, 1919, and February, 1922, when, as a result of protests by ratepayers, the reference library on the first floor was kept open. In 1920 the defendants decided to incorporate the library premises in the defendants' City Hall for administrative purposes, and up to the date of the writ in this action no alternative premises for the library had been acquired, and the books of the library had been removed to two other libraries in the defendants' area.

In these circumstances the action was brought by the Attorney-General on the relation of the vicar of St. Martin-in-the-Fields and the rector of St. Paul, Covent Garden, claiming a declaration that the defendants were not entitled to use the library building for their own administrative purposes, or to incorporate the same into the defendants' City Hall or to use the same otherwise than as a public library, or otherwise than in accordance with the rights of the ratepayers

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and parishioners of the two parishes with respect thereto; and for an injunction accordingly.

Tomlin J. held that it was ultra vires for the defendant council to use the library premises for purposes other than a public library, such user not being authorized by the Public Libraries Act, 1892, s. 12; and he granted an injunction to restrain the unauthorized user.

The defendants appealed.

Maugham K.C. and *Alan Ellis* (*Sheldon* with them) for the appellants repeated the arguments submitted by them in the Court below.

They further referred to the judgment of Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne*. (1)

Macmorran K.C., *Giveen* and *W. Lawson Campbell* for the respondents were not called upon.

POLLOCK M.R. [after stating the facts]. The whole question really turns upon the meaning and effect of s. 12 of the Public Libraries Act, 1892. (2) [His Lordship read the section and continued:] It is clear that the approval of the Board of Education (now substituted for that of the Local Government Board) has not been obtained to what has been done. Sect. 12, sub-s. 4, which is ancillary to the preceding sub-section, gives power to a library authority to let a house, or any part of a house, or any land vested in them which is not at the time of such letting required for the purposes of the Act. In my judgment the powers which are conferred by sub-s. 4 are not intended to be in contradiction of the powers granted by sub-s. 3. I do not think it would be possible for a library authority to let for a period, such as ninety-nine years, which might in fact enable them to do what they could not do under sub-s. 3. Under sub-s. 4 they do not have to obtain the approval of the Board of Education to a letting, whereas under sub-s. 3, for the purposes of sale or exchange, they do. If sub-s. 4 were interpreted as meaning that they had all powers of letting,

(1) [1910] A. C. 87, 97. (2) [1924] 1 Ch. 439.

so that they could let for a very long term of years at say a peppercorn rent, the powers under sub-s. 4 would render nugatory the restrictions which are imposed by sub-s. 3. In my judgment the power given by sub-s. 4 is to be read as ancillary only to the other powers, and is intended to confer upon a library authority the right to let for temporary purposes land which is not, at the time of the letting, required for library purposes.

What is suggested here is that the City of Westminster, the library authority, have power to close this library in St. Martin's Lane, and to make use of the premises for the purposes of the administration of the City. It appears on looking at s. 12 that there is no such power, and I think that, as my brother Warrington pointed out, it is very important to observe that in exercising the powers conferred upon them as library authority the defendants must do so in their capacity of library authority and with a single eye to that capacity, and they are not entitled, so to speak, to pool their powers, or exercise the powers conferred upon them as the library authority in conjunction with the many other powers which they possess. They have to exercise the powers given to them under s. 12 as the library authority, and to deal with the land which has been acquired for the purposes of the library in accordance with the Public Libraries Act. I need not add more to the reasoning which appears in the judgment of Tomlin J., with which I agree, on the question of the statutory powers of the City of Westminster. Counsel on behalf of the defendants suggested that in the present case no useful purpose would be served by the granting and by the continuing of the injunction, and he said that although the action was brought by the Attorney-General, yet the matter should be carefully examined, and the Attorney-General's powers and responsibilities were to be considered in this Court, and that the Court should not accede to the Attorney-General's application for an injunction, although founded upon right in the sense that the statutory powers of a public body had been exceeded, unless and until the Court were satisfied that that was on its merits a fit and proper

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course. I have perhaps stated the proposition of counsel too widely. On the other hand, I think it is important that there should be no doubt as to what are the powers and duties of the Attorney-General. Counsel quoted to us a passage from a judgment of James L.J. in *Attorney-General* v. *Great Eastern Ry. Co.* (1) I may call attention, however, in referring to that case, to the fact that the learned Lord Justice's observations about the powers and duties of the Attorney-General were not accepted by Baggallay L.J.; indeed, I understand Baggallay L.J. to have expressly dissented from them. He says (2): "It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed, as in my opinion it has been by the Great Eastern Company, it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues ex officio, or at the instance of relators." Having regard to the observations of James L.J., it is perhaps important to observe that in that very case Baggallay L.J., who had had the advantage of the experience of a law officer, which James L.J. had not, immediately took the opportunity to dissociate himself from the observations which had been made. Those observations cannot be taken as well founded, because, in view of what has been now laid down in the House of Lords in *London County Council* v. *Attorney-General* (3), I think the discretion of the Attorney-General is not fettered or circumscribed in the way suggested. Perhaps I ought also to refer to the fact that the observations made by James L.J. in *Attorney-General* v. *Great Eastern Ry. Co.* (1) were considered in *Attorney-General* v. *London County Council* (4) in this Court. Rigby L.J. there said: "The relators are also plaintiffs," and I gather that he does not accept the view which had been presented as to the duties of the Attorney-General, and I think that Vaughan Williams L.J. says words to the same effect. That case went to the House of Lords, and Lord Halsbury said (5)

(1) (1879) 11 Ch. D. 449, 482.
(2) 11 Ch. D. 500.
(3) [1902] A. C. 165.
(4) [1901] 1 Ch. 781, 803.
(5) [1902] A. C. 168.

that with all the respect that every member of the profession would feel towards James L.J. he did not accept the view that he had presented. He went on : "In a case where as a part of his public duty he has a right to intervene, that which the Courts can decide is whether there is the excess of power which he, the Attorney-General, alleges. Those are the functions of the Court ; but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me to be very undesirable to throw any doubt upon the jurisdiction, or the independent exercise of it by the first law officer of the Crown." A grave and important duty is cast on the Attorney-General as to whether or not he will grant his fiat and allow an action to be brought, either in his own name or upon the relation of others, either by himself or with others joined with him as plaintiffs. After what Lord Halsbury has said, the duty of deciding whether the action is one proper to bring to enforce certain rights must be vested in him, and in him alone, and I have no doubt that that jurisdiction has been exercised, as it always has been, with very great care and with due regard to the public interest and to the responsibility which lies upon the Attorney-General. If he decides that it is a right and proper action to bring, he is entitled to bring the matter before the Court, and the Court must accept the discretion which has been exercised by him. I add those words of my own, but I also want to emphasize the fact that all that had been said by Lord Halsbury was affirmed and assented to by Lord Macnaghten. Having regard to the position which the Attorney-General occupies before this Court, it does not seem to me to be possible to be questioned, as a matter of discretion, whether or not he is entitled to the redress which he asks in the public interest, in reference to a matter upon which a public authority has exceeded its powers.

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The Attorney-General has been satisfied that this is a case in which his duty requires him to take steps to see that that excess or attempted excess of public powers shall be brought to an end. Having regard to that, as we are of opinion that the powers of the statute have been exceeded, I think the Attorney-General has established his right to relief.

It has been said that, in view of the recent events, this Court ought not to affirm the injunction. We are informed that the City of Westminster Council are now fortunately able to provide a library in Wardour Street, that they are in process of arranging for a lending library to be established and carried on in the basement of the building in St. Martin's Lane. All that is satisfactory news. There is little doubt that, as a public library authority, the defendants are desirous of affording proper and full facilities, and no doubt they have many difficulties to contend with; but the learned judge appears to have been right, to have declared the rights of the parties correctly, and the only remedy for which the Attorney-General can ask in these circumstances is that there should be an injunction restraining the defendants from any further or continuing excess. We are told that the City of Westminster intend to go to Parliament, or it may be that they will go to the Board of Education, as they may be advised. Whether they go to Parliament, or to the Board of Education, it appears to me that their position will be strengthened by the fact that this injunction has been granted against them, and that it has been authoritatively established that they have not the power which they purported to exercise. In any event they would have the opportunity, if need be, of coming back to the Court, if the situation should require that some alteration should be made in the injunction; but as the matter stands at the present time the injunction is the right course. The learned judge was correct in his declaration of the law. I think that the injunction must be continued, and that, for the reasons which have been given by Tomlin J., the plaintiff, the Attorney-General, is entitled to succeed, not only in the action, but upon this appeal.

WARRINGTON L.J. I am of the same opinion. Tomlin J. has declared "that the defendants are not entitled to use the library premises"—that is the St. Martin's Lane Library—"for their administrative purposes, or to incorporate the same in their City Hall, or to use the same otherwise than for the purposes of the Public Libraries Acts." To that declaration I see no objection, and I am satisfied with the reasons given by Tomlin J. I only wish to add on my own account a few words on the argument addressed to us for the City of Westminster. At the time that these premises were purchased the library authority in the case of metropolitan districts was not necessarily, and I may say was not simply, the ordinary local authority. It was a separate body of Commissioners constituted by s. 22 of the Public Libraries Act, 1892. Subsequently the library authority as a separate body became merged in the several governing bodies of the metropolitan area, and in this case became merged in the Westminster City Council, and the City Council is now the public library authority for the City of Westminster. The argument addressed to us was to this effect, that as the purposes for which this property was to be used had not disappeared, it had become part of the common property of the City of Westminster, capable of being used for any purposes for which the property belonging to the City of Westminster could be used. In my opinion, the answer to that argument is this—that when the property was acquired there was imposed on it by the Legislation then in operation a particular purpose for which the property could be used, and the mere fact that for the convenience of administration or for other purposes the legislature has thought fit to get rid of a particular library authority and give the power of that separate authority to the City Council cannot, in the absence of express provision, have the effect of withdrawing from the land in question the restrictions which were originally imposed upon it.

With regard to the injunction, it was contended on behalf of the City Council that the Court ought not in its discretion

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to grant an injunction, even at the suit of the Attorney-General, unless the Attorney-General makes out that that which the public body concerned is doing unlawfully is of injury to the public. In support of that counsel for the council relied upon the well-known passage in the judgment of James L.J. in the case of *Attorney-General* v. *Great Eastern Ry. Co.* (1) That passage appears in the judgment of James L.J. only. He had two brethren sitting with him; one of them concurred in his decision, which I will mention directly, and the other dissented from his decision, and in terms dissented from the extreme views expressed by James L.J. in the passage in question. That part of the judgment of James L.J. was a dictum; it was not necessary for his decision, because he came to the conclusion on the merits that the Attorney-General was not entitled to the injunction for which he asked. Whatever may be the force of that passage in the judgment of James L.J., I think that now the question is entirely set at rest by the judgment in the House of Lords of Lord Halsbury, followed by Lord Macnaghten, in *London County Council* v. *Attorney-General.* (2) If the Attorney-General, acting on behalf of the public, in the exercise of his discretion as a public officer, comes to the conclusion that he is justified in asking the Court to restrain an illegal act on the part of a public body, I do not think this Court is entitled to refuse the injunction merely because it is said that there is no evidence of any public wrong being done. The real result, if that argument were to be acceded to, would be that in such a case there would be no means of preventing that kind of illegal act on the part of the public body in question. It seems to me, therefore, that as far as that is concerned the learned judge was right in granting the injunction, and nothing that has happened since would justify us in discharging or suspending the injunction. It may be said, and has been said, and it may be the fact, that under s. 12 of the Public Libraries Act, 1892, the City Council can lawfully carry out an exchange of the land in question for other land

(1) 11 Ch. D. 449, 482. (2) [1902] A. C. 165.

vested in them for other than library purposes. Speaking for myself, I do not express any opinion, adverse or otherwise, on the question whether such arrangements could lawfully be carried into effect; but, inasmuch as the absolute form in which the injunction at present stands might be held to prevent the City Council from carrying through and acting on such an arrangement by s. 12, I agree—and as to this Mr. Macmorran does not object—that the injunction should be prefaced by some such words as "Without prejudice to the exercise by the City Council of the powers conferred upon them by s. 12 of the Public Libraries Act, 1892." In other respects I think that the appeal should be dismissed.

SARGANT L.J. I am of the same opinion. I desire to add my protest to that of Warrington L.J. against the argument that the council having become possessed of these premises acquired under the Public Libraries Act, and having other premises acquired under other statutory authorities, or other authorities, are entitled to aggregate all their properties and all their powers and use any of their powers with regard to any of their properties. I think their powers in respect of these premises are powers under the Public Libraries Act, as the library authority, and not as an authority having a whole number of other powers under other Acts relating to other properties; otherwise illimitable confusion may be caused by a mere consolidation or regrouping of administrative powers under a single authority. With regard to the position of the Attorney-General, it seems to me to be now well settled that the Attorney-General has the same discretion in authorizing, initiating, or pursuing proceedings for the enforcement of public rights as a private individual has in proceedings for the enforcement of his private rights. In neither case can the exercise of the discretion be questioned by the Court.

Of course the discretion as to the relief to be granted, whether by injunction or otherwise, still rests with the Court, but as to the principles on which that discretion has to be exercised, I agree with the view expressed by the learned

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judge towards the conclusion of his judgment. In my view, therefore, the injunction was rightly granted at the time when he granted it, and I cannot see that there is any sufficient change of circumstances since the date of that judgment as a result of which we ought to vary the substance of the judgment.

POLLOCK M.R. The appeal will be dismissed with costs, but there will be the modification or addition to the order which Warrington L.J. has indicated.

Appeal dismissed.

Solicitors for the appellants: *Allen & Son.*

Solicitors for the respondents: *Travers-Smith, Braithwaite & Co.*

G. A. S.

C. A. 1924 — *May* 21, 22, *June* 20.

DEUCHAR *v.* GAS LIGHT AND COKE COMPANY.

[1922. D. 1498.]

Gas—Statutory Company—Statutory Powers—Express Power to convert and manufacture Residuals—Express Power to "provide" "materials"—Chemical Substance necessary for Conversion of residual Product—Implied Power to manufacture instead of buying Amount required.

A statutory gas company were empowered (*a*) to make and supply gas, (*b*) to convert, manufacture and sell residuals arising from gas-making or from the materials used therein, and (*c*) to make and sell all articles so produced.

They were also empowered (*d*) to make and maintain gasworks, machinery, and apparatus, (*e*) to manufacture refuse and products obtained from gas-making, and (*f*) to "provide" such apparatus and "materials" and do all such things as they deemed requisite for those purposes.

In order to convert their residual naphthalene into beta-naphthol (the proper method of using it) they required an outside chemical reagent—namely, caustic soda—which is neither a residual nor a product thereof:—

Held, that, as no particular method of "providing" the "materials" required for converting their residuals was prescribed or prohibited, the defendants were impliedly authorized to manufacture the necessary amount of caustic soda for themselves, and were not bound to purchase it from the chemical manufacturers.

Ashbury Railway Carriage and Iron Co. v. *Riche* (1875) L. R. 7 H. L. 653;

Baroness Wenlock v. *River Dee Co.* (1885) 10 App. Cas. 354, 362; *Attorney-General* v. *Great Eastern Ry. Co.* (1880) 5 App. Cas. 473, 478, 481; *Small* v. *Smith* (1884) 10 App. Cas. 119, 129; and *Lyde* v. *Eastern Bengal Ry. Co.* (1866) 36 Beav. 10, 16 applied.

London County Council v. *Attorney-General* [1902] A. C. 165 and *Attorney-General* v. *Mersey Ry. Co.* [1907] A. C. 415 distinguished.

Decision of Astbury J. [1924] 1 Ch. 422 affirmed.

APPEAL from the decision of Astbury J. (1)

The plaintiff was a holder of some of the defendants' preference stock. He was also the secretary of a chemical company associated with many others in a chemical combine.

The defendants were first incorporated by a Royal Charter of April 30, 1812, but at the present time their powers were regulated by private Acts of 1868 and onwards.

The 1868 Act (31 & 32 Vict. c. cvi.) provides as follows:—

Sect. 40 provides that the company "may make and store and supply gas, and may convert, manufacture, and deal with, sell, and dispose of coke, tar, coal, pitch, asphaltum, ammoniacal liquor, oil, and all other products, refuse, or residuum arising, remaining, produced by, or obtained from the making by them of gas, or the materials used therein, and may make and sell all articles produced from or by means of those several matters . . . . and generally may carry on all business from time to time usually carried on by gas companies.

Provided always, that the arrangements adopted by the company for the production of gas and coke, and for the utilization of the waste products of gas manufacture, shall embrace the most approved method in use at similar works from time to time established, and the company shall prevent the unnecessary discharge of smoke and the escape of noxious vapours and gases into the atmosphere.

Provided also, that nothing in this Act contained shall prevent the company from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of the manufacture or sale of any articles, matters, and things producible from the residual products arising from the manufacture of gas."

(1) [1924] 1 Ch. 422.

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Sect. 43 provides that the company upon the gas lands may continue, make, maintain, alter and discontinue gasworks, buildings, ... machinery, and apparatus and may make and store gas, and may "manufacture" coke and "other refuse and products remaining or obtained from making gas," and from "materials used in or produced by the making of gas" and may construct, erect, maintain, and "provide" such works, buildings, machinery, apparatus, and "materials," and do all such things as they deem requisite for those purposes. . . . .

The 1876 Act (39 & 40 Vict. c. ccxxv.) provides as follows:—

Sect. 5 provides that on certain lands therein specified, the company "may erect and maintain and use works for the manufacture and storage of gas, and for the manufacture, conversion, and storage of residual products."

Sect. 64 provides that the company may purchase, construct, maintain, and use all such appliances connected with the manufacture of gas, and "all such works for the manufacture or distillation of the products and residuals arising from or out of the manufacture of gas," upon the lands described in the Schedule "as they may require or deem necessary or expedient for efficiently and economically carrying on their undertaking."

The 1903 Act (3 Edw. 7, c. xli.) provides as follows:—

Sect. 13 provides that the company may use the lands therein referred to for making maintaining altering or discontinuing or for continuing to make or maintain thereon gasworks, buildings . . . . machinery and apparatus and may thereon make and store gas and make coke and "manufacture and deal with products refuse and residuals remaining or obtained from making gas or coke and from materials used in or produced by the making of gas or coke or manufacturing or dealing with the said products refuse or residuals" and may construct erect maintain and "provide" on the said lands such works buildings machinery apparatus and "materials" as the company deem requisite for the aforesaid purposes or any of them.

One of the ordinary residuals arising from making gas is naphthalene, and the ordinary commercial method of dealing with it is to convert it into beta-naphthol by the electrolytic process. This requires the use of caustic soda as a reagent. Caustic soda is neither a gas residual nor a product thereof, and for many years the defendants had bought it in the chemical market, and used this process, without any objection.

Recently however the defendants had come to the conclusion that they could carry on their undertaking more efficiently and economically if they bought the raw materials and made their own caustic soda. They therefore erected on the permitted lands a factory and plant of a capacity just sufficient to make the caustic soda required for converting their naphthalene.

A necessary by-product resulting from the making of caustic soda is chlorine. This is a dangerous product, which has to be got rid of under the Alkali, &c., Works Regulation Act, 1906 (6 Edw. 7, c. 14), and the defendants in fact used it for making bleaching powder out of non-residuals and selling the same.

On July 6, 1922, the plaintiff commenced this action for a declaration that the manufacture of caustic soda and chlorine was ultra vires and for an injunction.

The defendants relied on their statutory powers, and besides pointing out that the chlorine was only a by-product of the caustic soda they made, alleged in the alternative that the chlorine actually made was no more than was required for the conversion and manufacture of residuals—e.g., ammonia, benzene, toluene, cyanogen liquor and carbolic acid—so that its manufacture, even if intentional, was strictly within their powers.

The fact that they actually used the chlorine for making and selling bleaching powder out of non-residuals was not raised in the pleadings.

Astbury J. held that, as no particular method of "providing" the "materials" required for converting the company's residuals was prescribed or prohibited, the defendants were impliedly authorized to manufacture the necessary

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amount of caustic soda for themselves, and were not bound to purchase it from the chemical manufacturers. He accordingly dismissed the action.

The plaintiffs appealed. The appeal was heard on May 21 and 22, 1924.

Sir Douglas Hogg K.C., *Hunter Gray K.C.*, *Dighton Pollock* and *H. L. Murphy* for the appellant.

Sir J. Simon K.C., *Wilfrid Greene K.C.*, and *Andrewes-Uthwatt* for the respondents.

The arguments used in the Court below were repeated.

Cur. adv. vult.

June 20. POLLOCK M.R. The question to be decided in this appeal is whether the respondents, the Gas Light and Coke Company, have power to make caustic soda. The company were incorporated originally by a Royal Charter, but that was annulled by s. 4 of the Gas Light and Coke Company's Act, 1868. That Act, together with the Gas Light and Coke Company's Acts of 1876 and 1903, contain the provisions which govern their powers material to the present question.

It appears that one of the residuals arising from making gas is naphthalene, and that the ordinary commercial method of dealing with it is to convert it into beta-naphthol by a process which requires the use of caustic soda as a reagent. Formerly the respondents bought the caustic soda in the market. Recently they came to the decision that they could carry on their undertaking more economically if they purchased the necessary raw materials and made their own caustic soda. They have therefore erected upon their land a factory equipped with plant sufficient, and not more than sufficient, to make the caustic soda required as the reagent to convert the naphthalene produced in the course of making gas into beta-naphthol. Incidentally, in the course of making the caustic soda they produce a by-product, chlorine, and deal with it; but this fact, and how they deal with

the chlorine, does not in my opinion affect the question whether they have power to make caustic soda.

The respondents being a company incorporated by statute, their powers are determined by the provisions of the statutes to which it owes its existence.

Lord Watson, in *Baroness Wenlock* v. *River Dee Co.* (1), states what he interprets to be the principle recognized in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2) and *Attorney-General* v. *Great Eastern Ry. Co.* (3) as follows: "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions."

Illustrations of attempts to exercise powers which were not expressly conferred or derived by reasonable implication from its provisions can be found in *London County Council* v. *Attorney-General* (4), where it was sought to run omnibus traffic as incidental to tramways, and in *Attorney-General* v. *Mersey Ry. Co.* (5), where an attempt was made to collect traffic beyond the terminus of the railway in order to feed it. These attempts were held to be ultra vires and not reasonably incidental to or consequential upon the statutory powers of the company. It is to be noticed, however, that Buckley L.J., as he then was, was of opinion that as a question of fact the Mersey Railway Company were really running the omnibuses for the purpose of their railway and so as to obtain and give facilities for better traffic over their line, and that, as exercised, their powers were not exceeded: see also *Small* v. *Smith.* (6)

(1) 10 App. Cas. 354, 362.
(2) L. R. 7 H. L. 653.
(3) 5 App. Cas. 473.
(4) [1902] A. C. 165.
(5) [1907] 1 Ch. 81; [1907] A. C. 415.
(6) 10 App. Cas. 119.

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Two canons which are to be borne in mind should be mentioned. First, Lord Selborne says, in *Attorney-General* v. *Great Eastern Ry. Co.* (1): "I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Secondly, Lord Loreburn says, in *Attorney-General* v. *Mersey Ry. Co.* (2): "The rule of law has been laid down in this House"—that is in *London County Council* v. *Attorney-General* (3) and cases there cited—" to the effect that it must be shewn that the business can fairly be regarded as incidental to or consequential upon the use of the statutory powers; and it is a question in each case whether it is so or whether it is not so."

Lord Romilly, in the passage from his judgment in *Lyde* v. *Eastern Bengal Ry. Co.* (4), quoted by Astbury J. in his judgment, gives a useful illustration of the application of this rule to facts suggested in that case, as to the circumstances under which a railway company which had to use coal to work its system could acquire and work a colliery to supply the coal needed.

It is necessary, therefore, to consider the purposes of the Gas Light and Coke Company, and its statutory powers.

By s. 40 of the company's Act, 1868: "The company may make and store and supply gas, and may convert, manufacture, and deal with, sell, and dispose of coke, tar, coal, pitch, asphaltum, ammoniacal liquor, oil, and all other products, refuse, or residuum, arising, remaining, produced by, or obtained from the making by them of gas, or the materials used therein, and may make and sell all articles produced from or by means of those several matters." . . . . "And generally may carry on all business from time to time usually carried on by gas companies: Provided always,

(1) 5 App. Cas. 473, 478.
(2) [1907] A. C. 415.
(3) [1902] A C. 165.
(4) 36 Beav. 15, 16.

that the arrangements adopted by the company for the production of gas and coke, and for the utilisation of the waste products of gas manufacture, shall embrace the most approved method in use at similar works from time to time established, and the company shall prevent the unnecessary discharge of smoke and the escape of noxious vapours and gases into the atmosphere."

It is clear, therefore, that the purpose and business of the company is twofold, to make gas and, after the best treatment possible, to dispose of the residuals that have resulted from the process of making gas. It is fully recognized that you cannot make gas without producing residuals, and that these latter products ought to be utilized according to the most approved method.

It is not denied that a proper and commercial method of utilizing naphthalene is to turn it into beta-naphthol, nor that to do so caustic soda is a necessary and proper reagent. If so, there can be little hesitation in holding that it is a "material used" in the "converting manufacturing and dealing with" a residual product. It must be provided. Its provision is implicitly contemplated by s. 40. There is nothing to cut down this right and duty of provision. Indeed, s. 43 may be used as writing out in large the powers implicit in s. 40. It runs: "And may make and store gas, and may manufacture coke and other refuse and products remaining or obtained from making gas, and from materials used in or produced by the making of gas, and may construct, erect, maintain, and provide such works, buildings, machinery, apparatus, and materials, and do all such things as they deem requisite for those purposes."

I confess that my mind fluctuated in the course of the argument, partly because I was not sure that the learned judge had applied the rule deducible from the cases I have referred to: but a careful perusal of his judgment convinces me that he has applied this rule as to what is, by reasonable implication, incidental to or consequential upon the statutory powers expressly conferred, and that his judgment is right. It would be applying the rule too narrowly to hold that the

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making of the caustic soda for the purpose for which it is made lies outside the powers of the company, reasonably construed. The need of caustic soda as a material with which to convert the naphthalene is clear, and there is no express limitation as to the mode whereby they are to obtain it. I agree with the learned judge on the point made as to the chlorine that incidentally is produced; nor do I think that any express prohibition can be spelt out of the proviso to s. 40, whereby the company remain liable to indictment for creating a nuisance. I am of opinion that the judgment of Astbury J. is right, and that the appeal must be dismissed with costs.

WARRINGTON L.J. The question on this appeal is whether the defendants, the Gas Light and Coke Company, have power under their constituent statutes to make a certain substance —caustic soda—required for use in the conversion of one of the residuals obtained from the making of gas, which conversion it is admitted they are authorized to effect, or whether they are reduced to the necessity of purchasing the caustic soda in the market, it being, as it happens, a substance which can be so obtained, at a price.

The plaintiff, a stockholder in the defendant company, has instituted the present action, claiming an injunction restraining the company from making the substance, and his action has been dismissed by Astbury J., hence the present appeal.

There is no dispute about the law; the contention is as to its application to the facts of the present case.

The company is a statutory corporation, and therefore not only must its objects be ascertained from the Act itself, but the powers which the corporation may lawfully use in furtherance of those objects must either be expressly conferred or derived by reasonable implication from its provisions: see the speech of Lord Watson in *Baroness Wenlock* v. *River Dee Co.* (1) The use of the expression "by reasonable implication," as contrasted with the more familiar phrase

(1) 10 App. Cas. 354, 362

"by necessary implication," is important. It comes from the judgments in the *Attorney-General* v. *Great Eastern Ry. Co.* (1) I refer particularly to the speech of Lord Selborne L.C. where he says, referring to the case of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2): "Whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

The following facts are not in dispute: The defendant company are authorized to make and do make gas from coal. They are authorized to convert naphthalene, a residuum obtained in the making of gas, into beta-naphthol. For this purpose the most approved reagent is caustic soda, and the best way of making this substance is out of common salt by an electrolytic process. The company have recently, on land at East Ham purchased under their Act of 1876, erected a plant for the purpose of making caustic soda for use exclusively in the conversion of naphthalene into beta-naphthol, and in quantities only just sufficient for that purpose. Caustic soda can be bought by the company in the market, but at a cost largely exceeding the expense of making it themselves.

The existing objects of the company and its powers are defined by and derived from the Gas Light and Coke Company's Act, 1868, and certain subsequent Acts. The material section of the Act of 1868 is s. 40, which, so far as it is material for the present purpose, is in the following terms: "Subject to the provisions of this Act, the company may make and store and supply gas, and may convert, manufacture and deal with, sell, and dispose of coke, tar, coal, pitch, asphaltum, ammoniacal liquor, oil, and all other products, refuse, or residuum arising, remaining, produced by, or obtained from the making by them of gas, or the materials used therein, and may make and sell all articles produced from or by means of those several matters, and may contract for, take, and use any license or authority (but so as not to

(1) 5 App. Cas. 473, 478. (2) L. R. 7 H. L. 653.

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acquire any exclusive right) to work, use, exercise, or put in practice any inventions under any letters patent already or hereafter granted with respect to gas or products arising from the making of gas, and generally may carry on all business from time to time usually carried on by gas companies: Provided always, that the arrangements adopted by the company for the production of gas and coke, and for the utilisation of the waste products of gas manufacture, shall embrace the most approved method in use at similar works from time to time established"—the rest I do not think I need read.

They may therefore convert naphthalene, a residuum obtained from the making of gas. Nobody denies that caustic soda is properly used as a reagent in the conversion of naphthalene into beta-naphthol, itself a proper and authorized conversion. Caustic soda is therefore one of the materials required for the conversion in question, and as this is authorized, the provision of such a material is therefore by reasonable, if not even by necessary implication, authorized also. But it is said by the plaintiff that the company are only authorized to provide it in one way—namely, by purchase—and may not make it, even if to do so is a reasonable and more economical method of providing it. The foundation of their argument is that the Act in terms gives no power to make anything but gas. It is to be observed that this is quite true, and that the word "make" is used in s. 40 in reference only to gas. The dealing with residua and so forth is referred to by other words, summed up later in the section by the single word "utilization." But in my judgment the argument in question ignores the position that though the Act may not in terms give the power to make the particular substance, it may, and as I think by the subsequent words, does so by reasonable implication. The implication that I think arises reasonably from the express provisions is that the company may provide the materials proper for the conversion of residual products, and that without restriction as to the means employed for thus providing them; and I can see no reason why they should be

compelled to purchase if they prefer for business reasons to make them themselves. The fact is that the utilization of the products of gas is as much an object and purpose of the company as the making and supply of gas, and they may attain this object by any reasonable means, provided they do not do something which is actually forbidden.

My view in reference to the facts of this case may be thus summed up: The defendant company have express powers to convert naphthalene into beta-naphthol; they have by reasonable implication a power to provide the proper reagent for that purpose—namely, caustic soda; a proper and reasonable means of providing that substance is to make it, and, to do so not being excluded, they have by reasonable implication the power to provide the substance by that means.

So far I have dealt with s. 40 only, as I consider it to be the crucial section; but s. 43 may be read as authorizing expressly the provision of materials for conversion, and if so, the case for the company would rest on an express power to provide the caustic soda, instead of on one arising by reasonable implication.

If I am right in the view I have expressed as to the effect of s. 40 of the Act of 1868, then s. 64 of the Act of 1876 gives them power to erect and use their plant upon the land upon which they have erected and are using it.

The question of the further disposal of the chlorine produced in the process of making caustic soda is not raised in the present action, and I say nothing about it.

In my opinion the appeal fails, and should be dismissed with costs.

SARGANT L.J. In this case the differences between the appellant and the respondents have been narrowed down to a very definite and simple issue. It is clear that the respondents are entitled to convert the residuals arising in the manufacture of gas, including a particular residual known as naphthalene. It is also clear that for the purpose of converting this particular residual into beta-naphthol they

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may use caustic soda as a reagent. The sole question that remains is how they may provide this caustic soda. Are they limited to providing it by purchase from outside, or have they a discretion to provide it by making it themselves?

Astbury J. has held that the respondents are not bound exclusively to the one single method of provision by purchase, but may if they think fit employ the method of providing by manufacture. It is said that in coming to this conclusion he has not applied the proper test—namely, whether this method is reasonably incident to the statutory powers of the respondents—but has applied another test—namely, whether it is commercially advantageous for them to manufacture instead of purchasing. No doubt there are particular passages in his judgment which read alone might point to this view. But in those passages I think he is merely considering what may have been the motives which determined the respondents to exercise a discretion in favour of manufacture rather than of purchase. Whenever he is considering whether their statutes entitle the respondents to exercise the discretion in question, the learned judge seems to me to be applying the right test—namely, whether the exercise of this discretion is reasonably incidental to their express statutory powers. The judgment as a whole is based on a correct appreciation of the crucial question.

Further, I am of opinion that the learned judge has answered this crucial question correctly. There is nothing in any of the statutes to indicate that the company should provide their reagents by any one method rather than by any other; that they should purchase them rather than manufacture them. In some cases the one method may be the more advantageous; in other cases, the other. The choice is left at large, and therefore rests with the company.

It has been urged that the company are in fact embarking on a new and quite unauthorized business—namely, the making of caustic soda in competition with other manufacturers of caustic soda. If this were so in fact, if under cover of making for their own purposes they were really entering into competition in the open market, the legal

consequences might be very different. But the evidence is that they are not even fully supplying their own requirements, and that a balance has to be provided by purchase in the market. And there is all the difference in the world between merely supplying one's own needs and entering on the business of supplying outsiders: see, for instance, the recent decision of this Court in *Inland Revenue Commissioners* v. *Eccentric Club*. (1)

Some stress has also been laid by the appellant on the circumstance that, while the purchase of caustic soda would provide that and nothing else for the company, the manufacture of caustic soda involves the concurrent production of a noxious gas—namely, chlorine—which has to be got rid of innocuously, and is in fact treated so as to produce bleaching powder which is sold by the company. The fact that in the course of making the caustic soda there is a liberation of some other substance is a feature common to almost every process involving chemical reaction, and seems to me quite immaterial. The further fact that the chlorine so liberated is rendered innocuous, and indeed useful, by its conversion into bleaching powder which is afterwards sold, is not complained of in the statement of claim, nor sought to be restrained by the relief prayed. And in any case it is in my judgment a natural and trifling result, and not such as to justify a complaint that the respondents are exceeding their statutory powers.

Appeal dismissed.

Solicitors: *Baker, Blaker & Hawes; Parker, Garrett & Co.*

(1) [1924] 1 K. B. 390.

G. A. S.

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June 27, 30.

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[1923. S. 5730.]

Landlord and Tenant—Lease—Option to purchase Freehold—Exercisable during the Term of the Lease—Express Extension of Lease—Option not mentioned—Implied Extension of Option.

A three years' lease or tenancy agreement terminating December 25, 1917, gave the tenant an option to purchase the freehold for 700*l.* "during the three years hereby provided for."

In June, 1917, the landlord and tenant signed an indorsement agreeing "that this lease be extended for three years expiring December 25, 1920."

In September, 1920, the parties signed a further indorsement agreeing "that this lease be extended for three years expiring December 25, 1923."

These indorsements, though duly stamped, were settled informally by the parties themselves without legal aid:—

Held, on the construction of these documents, that it was not intended to extend the lease or tenancy agreement with all its provisions, collateral or otherwise, and that the option was not therefore extended.

Decision of Astbury J. ante p. 42 reversed.

APPEAL from the decision of Astbury J. (1)

By a tenancy agreement in writing dated October 29, 1914, and made between the defendant landlord of the one part and the plaintiff tenant of the other part, the landlord agreed to let and the tenant to take a certain house and premises for a term of three years from December 25, 1914, at 36*l.* per annum rent. The tenant agreed to pay the rent and keep the interior in repair, fair wear and tear excepted. The landlord agreed to keep the exterior in repair. It was further agreed that "the said tenant shall have the right to purchase the said house and premises during the three years hereby provided for, for the sum of 700*l.* sterling."

On June 17, 1917, during the pendency of this tenancy agreement the parties added and signed the following indorsement: "We the undersigned hereby agree that this lease be extended for three years expiring December 25, 1920."

In September, 1920, during the extended tenancy the parties added and signed the following further indorsement: "We the undersigned hereby agree that this lease be extended for three years expiring December 25, 1923."

(1) Ante, p. 42.

These indorsements, though duly stamped, were settled informally by the parties themselves without legal aid.

On September 17, 1923, during the extended tenancy the tenant's solicitors gave the landlord notice that the tenant desired to exercise the option of purchase and asked for an abstract of title.

On October 13, 1923, the landlord's solicitors replied that the option had long since expired.

On December 31, 1923, after further correspondence the tenant issued an originating summons under Order 54A. for a declaration that upon the true construction of the tenancy agreement of October 29, 1914, and the two indorsements thereon the tenant was on September 17, 1923, entitled to an option to purchase the freehold, and that this option was duly exercised by the notice of that date.

Astbury J. held on the construction of the documents that the parties intended to extend the lease or tenancy agreement with all its provisions, collateral or otherwise, and that the option was extended accordingly.

The landlord appealed.

Beebee for the appellant. The agreement to extend the lease did not extend the period for the option of purchase. In *Swinburne* v. *Milburn* (1) a perpetual right of renewal was claimed, but Lord Selborne there said that the burden of strict proof was imposed upon any one claiming such a right, and it could not be inferred by equivocal expressions capable of being interpreted otherwise. Here the expression "this lease" was capable of referring only to the relation of landlord and tenant, and did not include the option of purchase, which was altogether a collateral matter: *Raffety* v. *Schofield* (2); *Iggulden* v. *May*. (3) A landlord might well be willing to grant an option at a fixed price for a definite period, but not to continue it over an extended and re-extended period: see per Peterson J. in *In re Leeds and Batley Breweries*. (4)

(1) (1884) 9 App. Cas. 844.
(2) [1897] 1 Ch. 937.
(3) (1806) 7 East, 237.
(4) [1920] 2 Ch. 548.

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In *Batchelor* v. *Murphy* (1) there was an agreement to grant a new lease on the same terms as the old, and Tomlin J. held that an option of purchase was not included. That case, however, is under appeal. (2)

Evelyn Riviere for the respondent. The decision of the learned judge was right. It is entirely a question of construction. The intention of the parties was clearly to extend the lease with all its terms as it stood, including the option. In *In re Leeds and Batley Breweries* (3) Peterson J. expressed a strong opinion, favourable to the respondent's contention, upon almost identical documents. *Iggulden* v. *May* (4) was the case of the grant of a new lease. A strong intention must be found in those cases of covenants for renewal. They are not applicable to the present case. *Batchelor* v. *Murphy* (1) was a very different case. The words "this lease be extended" mean an extension of the whole agreement, with all its provisions, collateral or otherwise.

POLLOCK M.R. [without calling upon counsel in reply]. This is an appeal from a decision of Astbury J. upon an originating summons to determine the meaning of two indorsements upon a memorandum of agreement whereby certain premises were demised by Frederic John Tucker to Benjamin Sherwood. The agreement was dated October 29, 1914, and by it the premises were demised for a term of three years from the subsequent December 25. Although I do not know that it has any effect upon our decision, perhaps it is to be noted that the term originally stipulated for was for a period of more than three years from the making of the agreement, which ought therefore to have been under seal in accordance with the Statute of Frauds; but it is not material for the present purpose. On June 17, 1917—that is a few months before the demise ran out—the parties signed the following indorsement upon the agreement: "We, the undersigned, hereby agree that this lease be extended for three years expiring December 25, 1920," and again

(1) [1924] W. N. 207.
(2) Since reported ante, p. 252.
(3) [1920] 2 Ch. 551.
(4) 7 East, 237.

when that second period of three years was coming to its close, namely, in September, 1920, they signed another indorsement, namely, "We, the undersigned, hereby agree that this lease be extended for three years expiring December 25, 1923." It is to be observed that in those two agreements subsequent to the demise the words used are "that this lease be extended" in both cases. The original agreement contained a clause whereby an option was given to the tenant to purchase. The option is in these terms: "That the said tenant shall have the right to purchase the said house and premises at any time during the three years hereby provided for for the sum of 700*l.* sterling." We have to determine what is the effect of the subsequent agreement made in relation to the continuance of the lease upon the provision which gives an option to the tenant. It was said that the tenant had a right to exercise his option so long as the term of the demise continued. It was said on the other hand that this option was an option given, as it says, "during the three years hereby provided for," that is the original term, and not longer, and that the agreement which was made on the two successive occasions in June, 1917, and September, 1920, to extend the lease did not, and does not, extend the option. Astbury J. came to the conclusion that, looking at the documents as a whole, he was inclined to think that by the expression "this lease" the parties meant the actual document with all its provisions intact. There was some evidence before him that the parties were laymen, and it was said that the words "this lease" when used by them may have had a different signification to what they would have had if used by lawyers, and ought to be construed accordingly. I protest against the doctrine that the meaning of words ought to be construed according as they are used by laymen or by lawyers. I think that we have to take the words as they stand and construe them, and that we ought not to speculate upon what was the probable intention of the parties. Their intention is to be found in the meaning of the words which they have used, properly construed. What do the words which have been

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used in this case mean—"we agree that this lease be extended"; are those words apt to cover the option as well as the extension of the demise? I think they do not cover the option. There is a clear distinction between the two things. The first is the demise of the premises by the landlord to the tenant, and although it is to be found in an agreement, or in a lease signed and executed by the parties, still the option is a separate and independent contract whereby a chance is given to the tenant, under the conditions imposed, to purchase the freehold of the premises which are demised to him, and that that option is an independent contract is sufficiently indicated in one or two cases which have been cited to us. The nature of the distinction is pointed out in *Iggulden* v. *May* (1), and in that case, although no doubt it is not precise, and comments have been made upon it and counsel for the respondent has pointed out that what the Court had there to decide was whether or not there should be a perpetual renewal, still it is important and relevant in our view to find that the Chief Justice, Lord Ellenborough, speaks of the covenant to allow a renewal in these terms: "The argument, that a covenant for a lease with all the covenants cannot be satisfied by a lease with all but one, will have no weight, if according to the fair construction of the lease, that one covenant should be found to have nothing to do with the subject matter to be granted," pointing out that the option was not a necessary part and indeed was independent of the demise. Again in *Raffety* v. *Schofield* (2) Romer J., afterwards Romer L.J., considering what were the relations between the owner of some land and a builder under a building agreement with regard to the right of purchase, says: "It was in fact a new and distinct contract from that created by the building agreement, though it arose by reason of and flowed from the building agreement"; and earlier, in *Swinburne* v. *Milburn* (3), Lord Selborne, with reference to this right of renewal, after speaking of a number of authorities, said that those authorities did impose upon

(1) 7 East, 237, 241. (2) [1897] 1 Ch. 937, 942.
(3) 9 App. Cas. 844.

any one claiming such a right—that is a right to exercise an option—the burden of strict proof, and were strongly against inferring it from any equivocal expression which might fairly be capable of being otherwise interpreted. It is therefore in my judgment important that one should approach the question of the interpretation to be put upon these words bearing in mind the essential distinction which is to be drawn between the demise and the contract under which the option to purchase is given. They are essentially different.

Having regard to those principles I look at the words which are before us in this case, and twice over the words are used that "this lease be extended for three years." It is quite clear that a landlord may be prepared to give to his tenant an option to purchase at a fixed price for a limited period of time. The circumstance of value may enable both parties to fix upon a sum which will stand good for a definite time. It is quite another thing to say that the same considerations apply where there is an extension and a renewed extension of the term. This was well pointed out by Peterson J. in *In re Leeds and Batley Breweries*. (1) It is unnecessary to say more about that decision, with which I agree, than this, that the relevant consideration which appears to have dominated the learned judge's mind was, that remembering the distinction between an option and a demise and that the landlord may be content for a fixed time to be bound to a fixed price, it is another matter altogether to say that the option is to continue for an extended period unless clear words are used for that purpose. It seems to me that the learned judge points out the antithesis between a fixed price within a limited time and a fixed price which is to be carried on for a very much longer period. Now, in the present case, we have words which can be fully interpreted and adequately explained by holding that they relate to the demise and the demise only. The words that are used are not in the original terms of this document, but they were indorsed on it—"this lease," and the lease must mean the demise of the premises. Those are the words used. Full effect can be given to them by holding

(1) [1920] 2 Ch. 548.

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that they apply to the demise and the demise only, and I think it would be wrong to say that they mean not merely the demise but the demise and the option originally given as well. The words are I think not uncertain; they are appropriate to a continuance of the demise, and they are not appropriate to a continuance of the option.

With regard to *Batchelor* v. *Murphy* (1), the case before Tomlin J., I prefer to say nothing. I understand that it is under appeal. Whether it be so or not, I think it is a case which would probably deserve argument, and I therefore make no comment upon it either one way or the other. The other cases referred to and the other considerations lead me to the conclusion that the appeal must be allowed with costs.

WARRINGTON L.J. I am of the same opinion. The question is rightly stated in the originating summons in these terms. The plaintiff asks for "A declaration that upon the true construction of an agreement dated October 29, 1914, and made between the defendant of the one part and the plaintiff of the other part and two agreements indorsed thereon signed by the defendant and the plaintiff, the plaintiff was entitled to an option to purchase the freehold estate" there mentioned, and that he has exercised that option by a notice in writing. The learned judge has made the declaration asked for by the plaintiff. With all respect to him, in my opinion that order ought not to stand. The question is whether, where you find an agreement for a lease, or, as in this case, an agreement for a term of three years, containing an option to purchase, and the parties sign two subsequent documents extending the lease for a further period, the effect of those documents is not only to extend for a further period of three years the relation of landlord and tenant, but also to confer upon the tenant an extension of the special privilege given him by the option to purchase. It has frequently been held and may be treated as perfectly well settled that an option of purchase is not to be regarded

(1) [1924] W. N. 207; since reported ante, p. 252.

as a provision incident to the relation of landlord and tenant, but is a matter collateral to and independent of it. The last decision of the Court of Appeal in *Woodall* v. *Clifton* (1) is a good example of the application of that principle. There the question turned upon the construction of s. 2 of the Act of 32 Hen. 8, c. 34. That section provides, reading it shortly: "All lessees and grantees of lands for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage, and remedy against all and every person and persons, their heirs, successors, and assigns, which shall have any gift or grant . . . . of any other person or persons of the reversion of the same lands so letten, for any condition"—these are the important words—"any condition, covenant or agreement contained or expressed in the indentures of their lease and leases, 'as the same lessees, or any of them, might and should have had against the said lessors and grantors, their heirs and successors.'" The question raised in that case was analogous to that which we have to determine—namely, whether an option to purchase was to be included amongst the conditions, covenants or agreements contained or expressed in the lease so as to pass under the words of the statute to the grantees of the reversion. Romer L.J. said in the Court of Appeal: "Properly regarded it"—that is the option of purchase—"cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our

(1) [1905] 2 Ch. 257, 279.

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minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII. was dealing." It seems to me therefore that when the tenant sets up a contention that the indorsed document extending the lease has continued the option of purchase, what he has to show is that there is to be implied in the terms of those indorsed documents by necessary implication an agreement to continue the option. Prima facie those documents which extend the lease ought to be held to extend the relation of landlord and tenant, and the person who seeks to give to them any further meaning than that must find in the document extending the lease either something expressed—which of course there is not here—or something which by necessary implication has that effect. I think I am justified in making that statement of what I conceive to be the law by a few words in the judgment of Lord Selborne L.C. in *Swinburne* v. *Milburn* (1), in which it is true he was dealing with a different question—namely, whether a covenant to renew is one of those covenants which have to be inserted in the first and every other renewal under the covenant to renew; but he says: "As against a perpetual right of renewal, it is to be observed that there is nothing here which, either expressly or by necessary implication, points to perpetuity" —that is a continuance of the renewal in perpetuity—"if the words 'as often as one or two life or lives of and in the said tenements, &c., shall drop and be determined,' can be otherwise satisfied," and then, after referring to a case which I need not trouble about, he goes on: "I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly do impose upon any one claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted." If you read those words in the light of such decisions as those of which the decision of this Court in *Woodall* v. *Clifton* (2) is

(1) 9 App. Cas. 844, 849. (2) [1905] 2 Ch. 257.

an example, then I think those words are as applicable to the question that Lord Selborne had to determine as they are to the present question. I think it unnecessary to say more, because it is quite clear that the expression "the lease shall be extended" is capable of meaning the relation of landlord and tenant created by the document on which the memorandum of extension is indorsed. If it means the extension of the relation of landlord and tenant, then it does not include such a provision as an option to purchase, and with all respect I think the decision of the learned judge was wrong, and the appeal ought to be allowed and a declaration to the opposite effect ought to be made.

With regard to the decision of Tomlin J. (1) we are told that it is under appeal, and therefore I make no observation upon it beyond saying that the question will deserve to be argued when the time comes.

SARGANT L.J. I am of the same opinion. The words here are very short, but that does not diminish their difficulty. In fact their difficulty rather arises from their brevity. I am not sure that the decisions which have been referred to about covenants for the renewal of leases really help; for this reason, that there is always a difficulty in those cases in holding that a covenant to renew on the same conditions implies a toties quoties covenant—namely, that the covenant itself to renew shall be included in the document which is to contain the same conditions. I do not think that difficulty arises where the bargain to be construed is a bargain which is made by some subsequent document, as it is here.

Turning to this document, the phrase is "this lease be extended for three years." What does that mean? Does it mean that the term is to be extended or that the contract is to be extended with all its incidents? I think the word "extension" is not really strictly applicable, properly used, with regard to the document. You cannot extend the document. You cannot extend the actual lease. It is a word properly applicable to the extension of the term of

(1) [1924] W. N. 207; since reported ante, p. 252.

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years granted by the lease, though I incline to think that a very slight alteration of the terms here might have produced a different result. If the parties had agreed that the house should be taken for a further term of three years upon all the terms upon which it was taken under this contract the result might very likely have been different. But on the whole I cannot find in this document anything more than an extension, and an extension is prima facie applicable to the term granted, and does not necessarily involve the further grant of an option of purchase which is not itself one of the incidents of a tenancy strictly speaking. It is for the person who seeks to establish the relationship of vendor and purchaser to show that the right to create that relationship is given by the document under which he claims, and I cannot see that the respondent here has been successful—though I quite appreciate the force of the argument addressed to us—in showing that there was not merely an extension of the term of the tenancy, which is all I think the words strictly mean, but that there was also on each occasion a further bargain under which the collateral option to purchase was to be extended for a further period of three years.

Appeal allowed.

Solicitors : *Indermaur & Brown, for T. H. Morgan & Co., Colwyn Bay ; Pearce & Sons, for Nunn & Co., Colwyn Bay.*

G. A. S.

ELLIS AND COMPANY'S TRUSTEE *v.* DIXON-JOHNSON.

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May 9, 12, 13, 30.

[1923. E. 306.]

Bankruptcy—Speculative Account—Investments pledged to secure Current Balance due to Stockbrokers on Account of Dealings—Wrongful Sale of Shares by Pledgee—Right of Pledgee to recover Balance—Right of Pledgor on Payment to have pledged Securities returned—Breach of Contract—Damages for non-return of Securities—Account of mutual Dealings—Set-off—Date for taking Account—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 31.

The bankrupts were a firm of stockbrokers with whom the defendant had many years ago opened a speculative account, which was still current at the date of the bankruptcy, although there had been no transactions since 1913. As security for any debit balance due from him on the taking of their monthly account, the defendant had deposited with the firm the indicia of title to various investments, which included shares in two rubber companies, the value of which was about two-fifteenths of the total value of all the investments pledged. In March and November, 1921, the firm without the knowledge or authority of the defendant sold the rubber shares. On February 16, 1922, a receiving order was made against the firm, and on the same day they were adjudicated bankrupts, the effect of which was to close the defendant's account. On February 19, 1923, the trustee in bankruptcy of the firm rendered the defendant a final account, which (after giving the defendant credit for the actual proceeds received by the firm in respect of the sales aforesaid, on the footing that the breach of the contract, if there was a breach, consisted in the sales of the shares) showed a balance due from the defendant.

The present action was brought by the trustee to recover that balance. The defendant admitted indebtedness upon a proper account being stated, but denied the plaintiff's right to sue, in face of his expressed intention not to return the shares; in the alternative, he claimed that under s. 31 of the Bankruptcy Act, 1914, he was entitled to set off against the balance on the account, when ascertained, the value of the shares at the mean market price of the day on which the shares ought to be returned by way of damages for breach of the agreement to return the shares. The action was tried by Lawrence J., who on December 5, 1923, ordered an account to be taken by the Master of the sums due to the bankrupts' estate and a set-off of what was payable by their estate to the defendant as at the date of the certificate, the value of the shares sold to be ascertained as on the day of the breach—namely, the day preceding the date of the Master's certificate. The plaintiff appealed. On April 1, 1924, the Master made his certificate, by which he found that on the previous day, March 31, 1924, the total value of the shares sold exceeded the amount found due on the account to the defendant by 335*l.* 12*s.* 1*d.* The defendant had not proved for this sum in the bankruptcy, and stated that he did not intend to do so:—

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Held (by Warrington and Sargant L.JJ.; Pollock M.R. dissenting); that the proper date for ascertaining the value of the shares wrongfully sold by the bankrupts was the day preceding the date of the Master's certificate, and that as by the certificate it was found that nothing was due to the plaintiff the appeal failed and must be dismissed:—

Held (by Pollock M.R., agreeing with Lawrence J.), that the respective claims of the plaintiff and the defendant were the proper subjects of a set-off in the bankruptcy, but, differing from Lawrence J., that the proper date for measuring the damages was the date of the receiving order, as the effect of the receiving order on that date was to close the account as between the defendant and the bankrupts, whereupon by the terms of the bargain between them the balance of the account was to become immediately payable, with the result that the defendant became simultaneously entitled to the return of his securities.

Semble, if the sum realized by the sale of the shares proved to be greater than the value of the shares as at the date of the receiving order, the defendant would be entitled to set off the greater sum.

Held (by Warrington L.J.), that the bankruptcy was an irrelevant circumstance, unless the defendant should seek to prove against the bankrupts' estate for the balance certified to be due to him.

Semble, in that case his right of proof would be measured according to the state of things at the date of the receiving order.

Held (by Sargant L.J.), that there was no provision in the Bankruptcy Act, 1914, which relieved the plaintiff from the necessity of returning the securities as a condition of enforcing his correlative right to be paid any balance that might be found to be due to him on taking the account, and that as he had expressly refused to return the securities the action ought simply to have been dismissed.

Decision of Lawrence J. [1924] 1 Ch. 342 affirmed.

APPEAL from the decision of Lawrence J. (1)

The facts as found by the learned judge were as follows:—

The bankrupts were stockbrokers with whom the defendant had many years ago opened a speculative account, which was still current at the date of their bankruptcy. As a security for any debit balance which might from time to time be owing by him on that account, the defendant had deposited with the bankrupts the indicia of title to a number of investments, consisting of debentures, bonds and shares of various companies, together with blank transfers to the approximate value of 15,000*l*. Amongst the shares so pledged were 2000 fully paid ordinary shares of 1*l*. each in a company called Rubber Plantations Investment Trust, Ld. (hereinafter referred to as "the rubber shares") and 4600 fully paid

(1) [1924] 1 Ch. 342.

ordinary shares of 2*s.* each in a company called Kinta Kellas Rubber Estates, Ld. (hereinafter referred to as "the Kinta shares"). The proportion which the value of the rubber shares and the Kinta shares bore to the total value of the investments pledged was approximately two-fifteenths. Both the rubber shares and the Kinta shares were regularly dealt with and could be freely bought and sold on the London Stock Exchange.

The bargain arrived at between the defendant and the bankrupts, so far as material to be stated, was, that the bankrupts should in each month render an account to the defendant, that the balance shown by each account should be carried forward to the next account, that interest at the rate of $1\frac{1}{2}$ per cent. above bank rate should be charged on any debit balance, and that when the account was closed the bankrupts should render a final account and, on such final account being rendered, the defendant should pay the balance due from him, and thereupon the bankrupts should return to the defendant the investments which he had deposited with them by way of security.

In March, 1921, the bankrupts sold the whole of the rubber shares and 3600 of the Kinta shares, and in November, 1921, they sold the remaining 1000 of the Kinta shares. The shares were sold at the prices ruling on the Stock Exchange at the time of the sales—namely, 17*s.* $1\frac{1}{2}$*d.* for the rubber shares, and 2*s.* 3*d.* for the Kinta shares. The sales were uauthorized, having been effected without the knowledge or assent of the defendant whilst his account was still open.

On February 16, 1922, a receiving order was made against the bankrupts, and on the same day they were adjudicated bankrupts; the bankruptcy operated to close the defendant's account. On February 16, 1922, the price of the rubber shares was 13*s.* 3*d.* to 14*s.* 3*d.* and the price of Kinta shares was 2*s.* to 2*s.* 3*d.* On April 27, 1922, the plaintiff, who was then unaware of the fact that the shares in question had been sold, wrote to the defendant informing him (inter alia) that the rubber shares and the Kinta shares had been pledged by the bankrupts with certain of their creditors. Later on

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the plaintiff discovered the true facts, and thereupon wrote a letter, dated August 21, 1922, to the defendant's solicitors informing them that the rubber shares and the Kinta shares had been sold during the year 1921. On August 22, 1922, the price of the rubber shares was 13*s.* 9*d.* to 14*s.* 9*d.* and the price of the Kinta shares was 2*s.* 4½*d.* to 2*s.* 7½*d.*

The defendant admitted that his solicitors had full authority to act for him in all matters relating to his account, and stated in the witness box that they did not inform him of the sale of the shares until November 10, 1922, at which date the price of the rubber shares was 21*s.* to 22*s.* and the price of the Kinta shares was 2*s.* 7½*d.* to 2*s.* 10½*d.* The defendant had at least one interview with his solicitors in the interval between August 22, 1922, and November 10, 1922, and they had ample opportunity of communicating the fact of the sale to the defendant directly after they had received the plaintiff's letter of August 21. In those circumstances the Court found as a fact that full notice of the sales ought to be imputed to the defendant on August 22, 1922, and the Court declined to go into the question whether the information which his solicitors had received had or had not been communicated to him.

On February 19, 1923, the plaintiff rendered to the defendant what purported to be a final account in respect of the bankrupts' dealings on behalf of the defendant. In that account the plaintiff gave credit for the proceeds received by the bankrupts in respect of the sale of the rubber shares and of the Kinta shares as on the dates on which, and at the prices at which, these shares were sold. The balance shown to be due from the defendant on this account was 401*l.* 0*s.* 4*d.* On February 26, 1923, the writ in this action was issued, claiming 429*l.* 17*s.* 1*d.* (made up of the balance of 401*l.* 0*s.* 4*d.* together with interest up to date), and also claiming interest until payment. On February 19, 1923, and at the date of the writ, the price of the rubber shares was 26*s.* 3*d.* to 27*s.* 3*d.* and the price of Kinta shares was 3*s.* 3*d.* to 3*s.* 6*d.*, and at the date of the trial the price of the rubber shares was 27*s.* 7½*d.* to 28*s.* 1½*d.* and the price of the Kinta shares was 2*s.* 10½*d.*

to 3*s*. 1½*d*. The plaintiff, through his counsel, expressed his definite intention not to purchase any rubber shares or Kinta shares to replace those sold by the bankrupts.

The action was tried before Lawrence J. with witnesses on November 15 and 16, 1923.

On December 5, 1923, his Lordship delivered judgment, in which he held (1.) that the principle stated in *Walker* v. *Jones* (1), that a mortgagee was not entitled to sue for the mortgage debt, if he was unable to return the mortgage security through having wrongfully parted with it, applied to investments as well as to real property; (2.) that the defendant, although he might have elected to treat the contract as rescinded and to claim damages as for an anticipatory breach, was, nevertheless, entitled to hold the plaintiff to his obligation under the contract to return the shares when the time for performance arrived; but that, as the value of the shares which had been sold was comparatively small in proportion to the total value of the investments pledged and the shares were easily purchasable, the principle was only to be applied, in the present case, in a modified form, by allowing the defendant to set off against the ultimate balance to be found due on taking the account the value of the shares to be ascertained as on the day of the breach of the contract—namely, on the day when the shares ought to be returned to the defendant; and (3.) that under s. 31 of the Bankruptcy Act, 1914, the value of the shares to be ascertained according to the market price thereof on the day before the signing of the certificate must be set off against the claim of the trustee, notwithstanding that the defendants' claim to such set-off was made in an action and not by way of proof in the bankruptcy.

The order as drawn up was as follows: "This Court doth order that the following account and inquiry be taken and made, that is to say, (1.) An account of what is due from the defendant to the estate of the bankrupt firm of Ellis and Company in respect of the sale and purchase of shares on the defendant's behalf and that in taking such account the defendant be debited with interest on balances at 1½ per cent.

(1) (1865) L. R. 1 P. C. 50, 61, 62.

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above bank rate, the defendant to be credited in such account with all dividends which would have been received by the bankrupts or the plaintiff in respect of the 2000 Rubber Plantations Investment Limited shares and 4600 Kinta Kellas Rubber Estates Limited shares in the pleadings mentioned if they had not been sold. (2.) An inquiry what is the value of the said 2000 Rubber Plantations Investment Trust and the 4600 Kinta Kellas shares in the middle price of the day preceding the date of the certificate to be made under Account No. 1. And it is ordered that the amount found under Inquiry No. 2 be set off against the amount found due from the defendant under Account No. 1 and the balance certified."

The plaintiff appealed, and by his notice of appeal asked for judgment in the action for the amount claimed or such other amount as the Court might direct, and that the counterclaim might be dismissed.

Since the date of the notice of appeal—namely, on April 1, 1924—the Master had made his certificate, by which he found that on the previous day, March 31, 1924, the total value of the two sets of shares exceeded the amount due on the account by 335*l.* 12*s.* 1*d.*

The appeal was heard on May 9, 12, and 13, 1924.

Owen Thompson K.C. and *Hansell* for the appellant. The date of the receiving order is the proper date at which to ascertain what were the dealings between the parties so as to be capable of being made the subject of a set-off under s. 31 of the Bankruptcy Act, 1914: *In re Daintrey* (1); *In re Taylor*. (2)

The trustee in bankruptcy here must be treated as having had the shares in his possession at the date of the receiving order. There was then a right to a set-off and the value of the shares must be taken as at that date. After that date there could be no further transactions between the bankrupts and the defendant. The relationship of broker and client then ceased. The defendant by claiming a set-off must take if for better or worse as at the date of the receiving order.

(1) [1900] 1 Q. B. 546. (2) [1910] 1 K. B. 562.

[SARGANT L.J. I have a difficulty in seeing what bankruptcy has to do with the matter.]

There was a double relationship existing between the defendant and the bankrupts: (1.) that of mortgagor and mortgagee and (2.) that of client and broker. The plaintiff cannot act as a broker. The relationship of broker and client came to an end on the making of the receiving order, and all matters depending on that relationship must be determined as at the date of that order.

The judge has relaxed in the defendant's favour the equitable doctrine that a mortgagee must be ready to hand back the mortgaged property on payment off of the mortgage, having regard to the fact that similar shares to those mortgaged were easily procurable in the market. The date of the receiving order is the date when the value of the shares is to be ascertained and the set-off estimated.

[SARGANT L.J. Being ready to hand back the property on payment off has nothing to do with set-off.]

In the defence s. 31 of the Bankruptcy Act, 1914, is relied upon.

At the date of the receiving order the appellant was under an obligation to return the shares and at the same date there was owing to him a certain sum of money. There was therefore a right to a set-off under s. 31: *In re Taylor*. (1)

Damages for a tort may be set off: *Tilley* v. *Bowman, Ld.* (2) Here the shares were sold in 1921, and there is no evidence that there were any fluctuations in price between that date and the date of the receiving order.

[POLLOCK M.R. referred to *Halliday* v. *Holgate* (3) and *Coggs* v. *Bernard*. (4)]

It is submitted that the real relationship between the respondent and the bankrupts was that of pledgor and pledgee.

[POLLOCK M.R. The real point in your case is when did the right to sell the shares arise?]

(1) [1910] 1 K. B. 562, 568.
(2) [1910] 1 K. B. 745.
(3) (1868) L. R. 3 Ex. 299.
(4) (1703) 2 Ld. Raym. 909; 1 Sm. L. C., 12th ed., p. 191.

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In *Halliday* v. *Holgate* (1) the deposit of script certificates as security was treated as a pledge and not as a mortgage.

[SARGANT L.J. In that case the judge was dealing with the script certificates as not in any sense hypothecated.

WARRINGTON L.J. By the deposit of certificates of shares no title to the shares is conferred on the depositee.]

The bankrupts were entitled to sell the shares: *Deverges* v. *Sandeman, Clark & Co.* (2) In that case it was held that the mortgagee of shares (the mortgage not being by deed) had, in the absence of an express power of sale, an implied power to sell the shares on default by the mortgagor in payment of the mortgage money at the time appointed for payment, or, if no time was fixed, then on the expiration of a reasonable notice by the mortgagee requiring payment on a day certain. Cozens Hardy L.J. there expressed the opinion that the relationship between the parties was that of client and brokers.

[WARRINGTON L.J. What was there due to the brokers was the money they had paid for those particular shares. It was the ordinary broker's lien.]

The question whether reasonable notice was given depends on the circumstances.

The analogy of banker and customer must not be pressed too far. A stockbroker has active duties to perform which come to an end on his bankruptcy.

[SARGANT L.J. I do not think bankruptcy is material on the point as to the date at which the shares ought to be sold.]

[*Jenkins K.C.* referred to *Harrold* v. *Plenty.* (3)]

If the case is to be treated as one of wrongful conversion the date when the damages should be fixed is the date of the actual sale of the shares: see *Di Ferdinando* v. *Simon, Smits & Co.* (4); *S.S. Celia* v. *S.S. Volturno.* (5)

Di Ferdinando v. *Simon, Smits & Co.* (6), where it was held that the damages must be assessed as at the date when the breach was committed, is distinguishable from the present case. That was the case of a breach of contract.

(1) L. R. 3 Ex. 299.
(2) [1902] 1 Ch. 579, 596.
(3) [1901] 2 Ch. 314.
(4) [1920] 3 K. B. 409.
(5) [1921] 2 A. C. 544.
(6) [1920] 3 K. B. 409, 414.

[SARGANT L.J. The breach here is the failure to deliver the shares.]

That is not admitted. The contract, it is submitted, came to an end on the bankruptcy, which put an end to the relationship of broker and client.

S.S. Celia v. *S.S. Volturno* (1) deals with the point in more detail, and followed *Di Ferdinando* v. *Simon, Smits & Co.* (2) The case is referred to on the footing that the present case is to be treated as one of the wrongful conversion of shares.

A wrongful sale is, if anything, a tort.

The date of the receiving order is the material date, because the relationship of brokers and client then ceased.

[SARGANT L.J. There was no breach in not transferring the shares until the respondent was prepared to pay what was due. Are you not putting it that the rights of the respondent are less against the trustee than against the bankrupts ?]

Yes ; the appellant is not a stockbroker.

The bankruptcy in a case like the present is the relevant fact. Either the date of the bankruptcy or the date when the shares were sold is the date to be taken.

The effect of bankruptcy in the case of cross-claim is thus stated by Lord Selborne in *In re Milan Tramways Co.* (3): "Now under s. 39 of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions. A person comes in to prove a debt against the bankrupt's estate ; if there are mutual credits between the bankrupt and the creditor, then an account is to be taken, and the balance is to be proved against the estate, or paid to the estate, as the case may be."

It is submitted that s. 31 of the Act of 1914 is imperative. The bankruptcy introduces third parties into the transaction between the parties—namely, the general body of creditors. Here it is submitted there have been mutual dealings between the respondent and the bankrupts, and that being so s. 31

(1) [1921] 2 A. C. 544. (2) [1920] 3 K. B. 409, 414.
(3) (1884) 25 Ch. D. 587, 591.

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makes it imperative that the account should be taken as at the date of the bankruptcy.

A mortgagor's rights are not in any way saved by the Bankruptcy Act, 1914, although a mortgagee's are. The trustee here cannot be made to act as a broker. The receiving order has the effect of preventing the contract between the broker and the client being enforced.

The damages here are to be treated as a cross-claim in bankruptcy under the mutual credits clause.

The damages must be ascertained as at the date of the receiving order and the account taken as at that date under s. 31.

The judgment of Lawrence J. is therefore wrong, as it does not give proper effect to the provisions of the Bankruptcy Act.

Jenkins K.C. and *C. B. Marriott* for the respondent. The position of stockbroker and client has no bearing on the point. This was not a case of carrying over. There is here no question of differences. The respondent bought the shares in question and the bankrupts lent him the money and he made an equitable mortgage of them to secure the money lent by deposit of the shares with blank transfers. The respondent's account with the bankrupts had from 1921 been a dead account. The fact that the bankrupts were stockbrokers, so far as the question of the deposit is concerned, is a mere matter of history. They might have been a bank. In the account of January 31, 1921, the account showed a balance due to the bankrupts, which according to estimate was well secured. Since February, 1921, no broker's business had been done.

The trustee cannot claim to be in a better position than the bankrupts. He takes subject to all equities attaching to the property.

It is settled law that in the case of a mortgage of shares legal or equitable the mortgagee may sell in the case of a legal mortgage after the time fixed for repayment expired and in that of an equitable mortgage by deposit after the expiration of a reasonable time : *Stubbs* v. *Slater*. (1)

(1) [1910] 1 Ch. 632.

The estate here will not produce 1*s.* in the pound.

The right of the mortgagor here is to have the action dismissed, as the mortgagee cannot restore the mortgaged property.

The order the judge was asked to make was that the plaintiff could not recover anything. The defendant asked for the ordinary mortgagee's account on the footing that the shares should be handed back on payment by him of what should be found due on taking the account. This the judge refused.

The Master has treated the defendant as claiming damages for tortious conversion. The bankrupts could not have brought an action like that now brought by their trustee. The judge's order is right. It is quite sufficient for the plaintiff to say that until the shares are handed back to him he should not be called upon to pay anything.

It is not the defendant's case that there is any set-off at law, in equity, or in bankruptcy. His action has been throughout a defensive one. He has not sought to prove in the bankruptcy. No accounts were ever furnished to him on a proper basis before the bankruptcy.

If this is not a question of mortgagor and mortgagee then it is admitted that the case comes within the Bankruptcy Act, in which case the defendant could not have proved in respect of the equity of redemption in the shares. All he could have proved for would have been in respect of the contingent liability in the event of the trustee not handing over the shares on redemption.

This is not the simple case of cross-demands. The defendant has no cross-demand.

Owen Thompson K.C. in reply.

It is contended by the defendant that this is not a case of bankruptcy at all, but of mortgagor and mortgagee. Counsel for the defendant have, however, omitted the case of broker and client.

There was here the position of broker and client, and that relationship came to an end on the bankruptcy of the brokers. There was then a liability on the defendant to pay what should be found due from him on taking the account, and there was

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the liability of the bankrupts. There was, therefore, a right to a set-off. These were cross-liabilities owing to mutual dealings at the time of the bankruptcy. The defendant cannot by refusing to prove in the bankruptcy get out of the position of a person who could prove.

If the question of the time when the value of the shares is to be taken rests with the defendant it will delay the winding up of the estate. The cross-demands should be set off at the date of the receiving order, so that the trustee may know where he stands.

Cur. adv. vult.

May 30. The following judgments were delivered :—

POLLOCK M.R. This is an appeal from the judgment of Lawrence J., delivered on December 5, 1923, in an action brought by the trustee in bankruptcy of Messrs. Ellis & Co., who were stockbrokers upon the London Stock Exchange. A receiving order was made against them on February 16, 1922, and they were adjudicated bankrupt the same day.

The action was brought by writ dated February 26, 1923, to recover a balance claimed to be due to the estate of Ellis & Co. of 429*l.* 17*s.* 1*d.* The defence and counterclaim in respect of matters hereinafter more fully stated was delivered on May 2, 1923. The action was tried before Lawrence J. on November 15 and 16, 1923, and by his judgment the learned judge ordered an account to be taken by the Master of the sums due to the estate of Ellis & Co., and a set-off of what was payable by their estate to the defendant as at the date of the certificate, and he reserved the costs, and any incidental matters arising to be dealt with by him, until after the Master had made his certificate.

It is important that I should refer to the relevant facts of the case, because, in the main, it is in consequence of those facts that I have come to a conclusion different from that of the learned judge and of my learned brothers, a conclusion which, in my judgment, renders it unnecessary to deal with some of the matters on which the learned judge gave a decision.

The facts of the case are found by the learned judge in his judgment. I have carefully considered the evidence and materials before the learned judge, and agree with him in his presentment of the facts, which it is unnecessary to restate except in so far as may be essential to my judgment, and for the purpose of giving emphasis to certain features which are, to my mind, of importance.

The bankrupts were stockbrokers upon the London Stock Exchange, and the respondent at some time earlier than July 1, 1910, had opened a speculative account with them as his brokers for the purchase and sale of shares. The witness Hepworth, who was in the employ of Ellis & Co., gave uncontradicted evidence that up to the time when emergency rules were adopted, and imposed by the Stock Exchange Committee, the usual fortnightly accounts were rendered by Ellis & Co. to the respondent. Thereafter the account was continued on the terms of the bargain stated by the learned judge (1)—namely, "That the bankrupts should in each month render an account to the defendant, that the balance shown by each account should be carried forward to the next account, that interest at the rate of $1\frac{1}{2}$ per cent. above bank rate should be charged on any debit balance, and that when the account was closed the bankrupts should render a final account, and, on such final account being rendered, the defendant should pay the balance due from him, and thereupon the bankrupts should return to the defendant the investments which he had deposited with them by way of security." The learned judge also finds (2): "As a security for any debit balance which might from time to time be owing by him on that account, the defendant had deposited with the bankrupts the indicia of title to a number of investments, consisting of debentures, bonds and shares of various companies, together with blank transfers to the approximate value of 15 000*l*." It may be added, as appears from the correspondence, that on some of these securities dividends were received by the bankrupts, and duly credited to the respondent in the accounts rendered to him. Those accounts were made up, and rendered monthly

(1) [1924] 1 Ch. 342, 343. (2) Ibid.

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to the respondent down to the date when the account was closed.

During the war some of the securities purchased for the respondent, and which were being carried for him by the bankrupts, were sold. There were no purchases made since the outbreak of war. The respondent was absent from England during some of the years of the war, and only returned to England in the spring of 1921.

Upon the above statement of its terms, it seems clear to me that the account open between the respondent and the bankrupts was necessarily closed on the date of the adjudication of Ellis & Co. as bankrupts on February 16, 1923. Their bankruptcy, under the rules of the Stock Exchange, determined their power to act as brokers ; and by s. 7, sub-s. 1, of the Bankruptcy Act, 1914, their property passed to an Official Receiver for administration in bankruptcy. Inasmuch as the receiving order was made, and the adjudication took place on the same day, the distinction between them, and the relation back of the trustee's title to the earlier order, is not in this case of importance, though it is proper to bear in mind that the date of the receiving order is, under ss. 7 and 30, the material date on which the capacity of the bankrupts to act as brokers ceased. It is at that date that the balance due from the respondent to the estate is to be calculated and paid, even if, owing to necessary delay, the actual account is not rendered till a later date: see *In re Daintrey* (1), per Bigham J., and in the Court of Appeal, per Lindley M.R., and *In re Taylor* (2), per Phillimore J. (3), and per Buckley L.J. (4)

Correlatively on this basis the respondent became entitled, as at that date, to the immediate return of the securities deposited with the stockbrokers. At that date the securities that remained in the stockbrokers' hands were, substantially, two only—namely, 2000 " Rubber " shares—that is, 2000 fully paid ordinary shares of 1*l.* each in a company called Rubber Plantations Investment Trust, Ld., and 4600 Kinta Kellas—namely, fully paid ordinary shares of 2*s.* each in a company

(1) [1900] 1 Q. B. 546.
(2) [1910] 1 K. B. 562.
(3) Ibid. 568.
(4) Ibid. 580.

called Kinta Kellas Rubber Estates, Ld., for the respondent on November 27, 1921, had agreed to the sale of all his other securities in order, pro tanto, to liquidate his account as far as possible. What happened to these shares is told by the learned judge as follows (1): "In March, 1921, the bankrupts sold the whole of the rubber shares and 3600 of the Kinta shares, and in November, 1921, they sold the remaining 1000 of the Kinta shares. The shares were sold at the prices ruling on the Stock Exchange at the time of the sales—namely, 17*s.* 1½*d.* for the rubber shares, and 2*s.* 3*d.* for the Kinta shares. The sales were unauthorized, having been effected without the knowledge or assent of the defendant while his account was still open." The total sum realized by the unauthorized sales of the shares was 2230*l.*

It is argued that the transaction between the bankrupts and the respondent was merely that of an account or loan owing from the respondent to the bankrupts with security against the sum so due, and that it might be considered to be a "dead" account, inasmuch as there had not been any purchases for the respondent's account for several years. I do not feel able to place any weight upon the activity or inactivity in the transactions. The terms of the bargain on which the account was opened, and the terms on which it was to be closed, must be, in my opinion, kept clearly in view. Those terms were not altered by the fact that fresh stocks were not purchased, and added to the security—although they might have been—any more than by the improper sale of the securities, which ought to have been available for immediate release to the client at the same moment as when the latter, in accordance with his bargain, paid, or should have paid, the sum due from him when the account was closed. The respondent in para. 4 of his defence pleads that in breach of the agreement between them, and without his knowledge or consent, before the date of the receiving order, Ellis & Co. sold the shares as already stated. It is clear, therefore, that the respondent's claim on this head was a debt and liability present, and not contingent, to which the debtor

(1) [1924] 1 Ch. 342, 344.

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was subject at the date of the receiving order, and so must be deemed in accordance with s. 30 to be a debt provable in the bankruptcy.

The learned judge finds that there was, and is, a free market on the Stock Exchange for both classes of shares improperly sold by the bankrupts. It is thus easy to ascertain the precise position in terms of money between the bankrupts and the respondent, as it should have been if the bargain between them had been carried out on the date when it came to an end—namely, February 16, 1922. The respondent, by his defence, relies upon the mutual dealings clause of the Bankruptcy Act, and the set-off provided therein—that is s. 31—and, in my judgment, rightly. Without its operation the respondent would be liable for the amount of his debt to the estate of Ellis & Co., and would be compelled to prove in the bankruptcy for his loss suffered by the improper sale of his securities pledged to Ellis & Co. where, under it, the respondent's claim for damages can be set off: see *Booth* v. *Hutchinson* (1); *Palmer* v. *Day & Sons* (2), per Lord Russell of Killowen.

Upon the facts found by the learned judge the case seems to me clear. By the very terms of the bargain the respondent had to pay when the account was closed, and that date was February 16, 1922, when Ellis & Co. were adjudicated bankrupts.

The securities deposited with Ellis & Co. by the respondent were so deposited, not as a separate transaction to obtain a loan upon the security of them, but as cover for any sums that might from time to time be due from the respondent while the purchase and sales of stocks and shares was carried on by the brokers for the respondent's account, and the account was carried over, fortnightly or monthly, from account to account. The stockbrokers were equitable mortgagees of some of the securities deposited with them, and perhaps in some cases legal mortgagees, for there is evidence that upon some shares they received the dividends. Accepting the view that this is the true relation in respect of the securities, it was not the only relation between them. The dominant relation

(1) (1872) L. R. 15 Eq. 30. (2) [1895] 2 Q. B. 618, 622.

was that created by the contract under which the account was opened, and continued, and ultimately closed. To my mind it is unnecessary to enter into the question so fully discussed by the learned judge, as to whether the trustee in bankruptcy is wholly debarred from suing, seeing that he cannot produce the shares originally deposited with the bankrupts; nor to decide how far that principle is to be set aside or modified, whether by imposing a set-off in equity or otherwise. The estate is in bankruptcy, and the plaintiff's title is as trustee in the bankruptcy, and there is a right of set-off under s. 31 in bankruptcy, not merely a defence in equity to a mortgagee's claim for his debt.

Equally the questions of an anticipatory breach, and as to proof of a contingent liability against the estate, do not arise. The "contingency" which created the liability to replace the shares, or their value, happened before the date of the adjudication: see per Bigham J. in *In re Daintrey*. (1)

The learned judge arrives at the same conclusion to which I come by a different process—namely, to the conclusion that the claim of the trustee for the debt due, and the claim of the respondent for damages in respect of his shares improperly sold are to be set off, and that the latter claim can be measured by the market value of the shares at the appropriate date. But for the reasons which I have given that date must be the date of the receiving order. The matter falls to be determined in bankruptcy, and is not to be treated as if the balance of the account were the foundation of the judgment: see per Lord Buckmaster in *S.S. Celia* v. *S.S. Volturno* (2); see also per Scrutton L.J. in *Di Ferdinando* v. *Simon, Smits & Co.* (3)

There is, in my judgment, no reason to displace the decision of Lindley M.R. in *In re Daintrey* (4), that the date of the receiving order is the proper date to be taken.

One further point must be mentioned. Neither the debtors nor their estate is entitled to reap a profit out of their

(1) [1900] 1 Q. B. 546, 568.
(2) [1921] 2 A. C. 544, 547.
(3) [1920] 3 K. B. 409, 414.
(4) [1900] 1 Q. B. 546, 572.

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fraudulent act. In my judgment, and the trustee does not claim otherwise, the sum which the shares actually realized must be taken as the amount due to the respondent, if, as I understand the fact to be, that sum is larger than if the realization had been on the date of the adjudication: see the observation of Collins M.R. in *Michael* v. *Hart & Co.* (1) In any case their value must not be taken to be less than the total of their price on that day. In my judgment, the account must be taken as at that date—namely, February 16, 1922—and the amount due on either side adjusted accordingly. If the result is that there is a balance due to the respondent on his counterclaim he will have a right of proof in the bankruptcy for the amount of it.

WARRINGTON L.J. The plaintiff in this case is the trustee in bankruptcy of Ellis & Co., a firm of stockbrokers in which Gerard Lee Bevan was a partner.

The plaintiff alleges that on February 16, 1922, the date of the receiving order, there was a balance due to the firm on an account between them and the defendant, and he brings this action to recover that balance with further interest. As security for the balance for the time being the defendant had deposited the indicia of title of a number of investments such as debentures, shares, and so forth, accompanied by blank transfers. In particular he had deposited the certificates of 2020 fully paid ordinary shares in a company called Rubber Plantations Investment Trust, Ld. (hereinafter referred to as "the Rubber shares") and 4600 fully paid ordinary shares in a company called Kinta Kellas Rubber Estates, Ld. (hereinafter called "the Kinta shares"), together with blank transfers of both sets of shares. The facts clearly establish an equitable mortgage of the shares in question; the shares were capable of redemption by the mortgagor at any time on payment of the balance due, and the mortgagees would have the ordinary right of forclosure on taking proper proceedings for the purpose: see *Harrold* v. *Plenty*. (2) It may be that in some cases the mortgagees obtained a legal interest in

(1) [1902] 1 K. B. 482, 488. (2) [1901] 2 Ch. 314.

the mortgaged property, but that fact would not alter the position for the purposes of this decision.

The terms of the bargain are stated by Lawrence J. in the report of the case in the Law Reports (1), and I do not propose to repeat them. It is enough to say that such terms did not authorize the sales hereinafter mentioned.

In March, 1921, and in November, 1921, the firm sold at the market prices of the respective days of sale 2000 of the Rubber shares, and the whole of the 4600 Kinta shares. Such sales were made without the knowledge of and were in fact concealed from the defendant, who only discovered that they had taken place after the bankruptcy of Ellis & Co. The result is that the plaintiff is unable on payment of the balance secured by the mortgage to return to the mortgagor a material portion of the mortgaged property, and the real question on this appeal is whether under those circumstances he can sue the mortgagor for his debt without either procuring other shares of the same denomination as the mortgaged shares or, at all events, being ready on payment of the debt to pay to the mortgagor such sum of money as at the time of payment would be enough to purchase such shares. The shares in question were at all material times regularly dealt with and could be freely bought and sold on the London Stock Exchange. The learned judge has pronounced judgment in the following form: [His Lordship read the order above set out and continued:] From this order the plaintiff appeals and asks for judgment in the action for the amount claimed or such other amount as the Court may direct, and that the counterclaim may be dismissed.

Since the date of the notice of appeal—namely, on April 1, 1924—the Master's certificate has been made, by which it appears that on the previous day, March 31, 1924, the total value of the two sets of shares exceeded the amount due on the account by 335*l.* 12*s.* 1*d.* Under these circumstances all that the defendant asks us to say is that the judgment of the learned judge, if it errs at all, does so in being too favourable to the plaintiff, but that, whether this be so or not, it is

(1) [1924] 1 Ch. 342, 343, 344.

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right in principle in giving effect to the rule in equity that a mortgagee who cannot or will not return the mortgaged property on payment is not entitled to sue for the debt. There can, I think, be no question that such was and is the rule in equity. In *Palmer* v. *Hendrie* (1) the rule was there stated by Romilly M.R. : " These then are the relative duties and reciprocal obligations between mortgagor and mortgagee :— The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage money has been fully paid, he is bound to deliver over the mortgaged estate to the mortgagor. The question is, whether, when the mortgagee has made it impossible to restore the property mortgaged, he can proceed against a mortgagor to recover the amount of the mortgage money. He can, undoubtedly, at law, sue upon the covenant, and, consequently, the executors of Hendrie are, at law, entitled to recover from the plaintiff the unpaid mortgage money :— but the mortgagees must perform their reciprocal obligations : they are bound, on payment, to restore the property to the mortgagor, and"—this is a most important part—" if it appear, from the state of the transaction, that, by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law."

This statement of the law was cited and adopted by Stirling J. in *Kinnaird* v. *Trollope* (2), and has never, so far as I am aware, been questioned or doubted. Is there any reason why it should not be applied to such a mortgage as that in question in this case ? I agree with the learned judge that there is none. The rule is based on the very nature of a mortgage security, and the reciprocal obligations of mortgagor and mortgagee, and is, in my opinion, in accordance with justice and common sense. But obviously, as the learned judge has pointed out, its application to a case where the mortgaged property or property identical in all material respects therewith is readily purchasable on the market may

(1) (1859) 27 Beav. 349, 351. (2) (1888) 39 Ch. D. 636, 644.

very well be different to its application to an ordinary mortgage of land. It would be absurd to insist on a retransfer of the identical shares mortgaged when other shares of the same nature are available, and so also, I think, the judge is right in substituting for the actual shares the value thereof, inasmuch as the money representing the value could, if the mortgagor so pleases, be at once invested in the purchase of shares.

Then was the judge right in fixing the day before the certificate as the date as on which the value was to be ascertained? I think he was, because up to that date, but no longer, the mortgagee was in a position to qualify himself to fulfil his obligation should the mortgagor tender the amount of the debt. On this point I refer to *In re Chesterman's Trusts*. (1) The judgment gives effect to the principle that payment can only be required from the mortgagor conditionally on the performance by the mortgagee of his reciprocal obligation to restore the mortgaged property or its equivalent, and the appeal against it should, in my opinion, be dismissed.

From the point of view from which, as it seems to me, the case should be regarded, the bankruptcy of the mortgagees is, in my opinion, an irrelevant circumstance, but unfortunately, as I venture to think, the learned judge went further than was necessary for giving effect to the case really set up by the defendant, and discussed the totally different question as to what right of proof, if any, the defendant would have, should the value of the shares at the date of the day before the certificate prove, as it has in fact proved, to be larger than the sum due from the defendant. On this question I only say this, that I am by no means satisfied that the opinion expressed by the learned judge is correct. The fact of the bankruptcy here becomes most material, and without expressing any decided opinion on the point I am inclined to think that any right of proof which the defendant may have must be measured by the state of things at the date of the receiving order.

However this may be nothing can, in my opinion, be recovered from the defendant except on condition of paying

(1) [1923] 2 Ch. 466.

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him a larger sum than that due from him—a condition the plaintiff would obviously not fulfil, and therefore this appeal fails, and should be dismissed with costs.

SARGANT L.J. To the facts found by the learned judge in this case I desire to make only one addition. This is that there is no evidence of any speculative transactions by the firm of Ellis & Co. for the defendant later than the year 1913. From the beginning of the year 1914, or, at any rate, from the commencement of the late war, the investments charged to the firm were held as security for a balance of indebtedness, which had no doubt had its origin in a speculative account, but was not affected by any subsequent speculative transactions. From that time forward the relations between the defendant and the firm were merely those of mortgagor and mortgagee, the mortgaged property comprising a number of bonds and shares which included 2020 1*l.* shares (referred to as the "Rubber" shares), and at a later date 4600 2*s.* shares (referred to as the "Kinta" shares). The mortgage was constituted by a deposit of the evidence of title to the mortgaged property, together with blank transfers, and was of an ordinary type, such as is frequently dealt with in the Chancery Division: see, for instance, *Harrold* v. *Plenty*. (1) But I by no means intend to suggest that my judgment would be different had the speculative transactions continued, and the balance due to the firm varied from time to time.

In my opinion, the rights of the parties are best determined by considering, first, what would have been the position of the firm in relation to the defendant had there been no bankruptcy; and, secondly, whether the plaintiff, as the trustee in bankruptcy of the firm, has any different or better right against the defendant than the firm would have had.

First, then, as between the firm and the defendant, what is the right of a mortgagor? The cases of *Walker* v. *Jones* (2) *Palmer* v. *Hendrie* (3); and *Kinnaird* v. *Trollope* (4) have definitely recognized that, in general, a mortgagee or his

(1) [1901] 2 Ch. 314.
(2) L. R. 1 P. C. 50.
(3) 27 Beav. 349.
(4) 39 Ch. D. 636.

assignee cannot recover his debt from the mortgagor except upon performing his reciprocal obligation of reconveying the mortgaged property to the mortgagor. And, accordingly, where the security for the debt was a specific estate, and through the unauthorized acts of the mortgagee it had become impossible to restore the estate at law, the mortgagee lost the right to sue for the mortgage debt. In a case like the present, where the security that has been wrongly disposed of in part by the mortgagees consisted of freely marketable shares which can readily be replaced by others of precisely similar value, there is no necessity for insisting on the restoration of the particular shares charged. The obligation of the mortgagee can be sufficiently performed by the replacement of the shares by others of the same denomination, or even by furnishing the mortgagor with funds sufficient to enable him so to replace the shares. But I see no reason for further relaxing the clear general principle, that, as a condition of recovering his debt or the balance of it, the mortgagee must perform the reciprocal obligation of restoring the security, or so much of it as has not been properly disposed of by him.

If then this would have been the position of the firm had they been suing the defendant, is the plaintiff, as their trustee in bankruptcy, in any better case? Were he an ordinary assignee the answer would obviously be in the negative. The decisions that have been cited treat the assignee of a mortgagee as being on the same footing as the mortgagee himself. The plaintiff indeed has endeavoured to differentiate his position from that of an ordinary assignee by referring to the provisions of the Bankruptcy Act as to mutual credit and as to the date at which damages have to be assessed when proved for. In my judgment, these provisions have no relevance here. The defendant has never claimed to prove in the bankruptcy, and has expressly disclaimed before this Court the right to do so in respect of the balance in his favour that has been found by the Master on the account directed by the learned judge. That which the defendant has set up at the trial and before us is a defence pure and simple, and does not involve any set-off, still less any counterclaim. He claimed before the

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learned judge, and has claimed before us, simply and solely, that he should not be called on to perform his obligation of paying the balance of his debt except upon the terms of his obtaining the benefit of the reciprocal obligation to restore or replace the balance of his property. And I can see nothing in the Bankruptcy Act to free the plaintiff from the necessity of performing this reciprocal obligation as a condition of enforcing the correlative right to be paid the balance of the debt.

I may perhaps call attention to a somewhat remarkable illustration of the illogical character of the plaintiff's claim. In the account rendered by him to the defendant before action brought the latter was credited with the then value of a part of the security which had been mortgaged by the firm, without any impropriety, but so as to be in fact beyond the power of the plaintiff to restore in specie. It would be odd if this larger obligation rested on the plaintiff with regard to a part of the security which had been properly dealt with, while with regard to the part improperly sold the plaintiff had the option of performing the smaller obligation of accounting for the proceeds actually realized by a wrongful sale at a time when the price of the shares sold was considerably less.

In my view, the judgment of Lawrence J. was slightly too favourable to the plaintiff, both in giving the plaintiff the chance of recovering a balance in case the Rubber shares and Kinta shares should have fallen heavily between the date of the judgment and that of the certificate, and in his method of assessing the obligation of the plaintiff. In my view, having regard to the express refusal of the plaintiff to make good the shares, the action should simply have been dismissed. And, if the question of the plaintiff's obligation had to be ascertained, I think that it was insufficient to ascertain it by taking the middle price of the shares, and that it should have been measured by the actual cost of obtaining the shares—that is, their cost to buyers and any necessary commission to the buying brokers. But these are small points and in no way affect the actual result, inasmuch as both at the date of the writ, and at that of the hearing, and at that of the certificate

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the market value of the shares considerably exceeded the balance due from the defendant. Naturally, therefore, the defendant has not thought it worth his while to appeal. No doubt the learned judge will dismiss the action when it next comes before him on the certificate.

In the view I have taken no question arises as to the time for the ascertainment of damages or as to the amount that can be proved for, and it is unnecessary to consider or express any opinion on the judgment of the learned judge on these points.

Appeal dismissed.

Solicitors for appellant: *Piesse & Sons.*
Solicitors for respondent: *Vandercom, Stanton & Co.*

W. I. C.

C. A. 1924 *June* 4, 5, 23, 24.

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[1922. S. 2440.]

Easement—Light—Ancient Lights—Threatened Obstruction—Quia timet Action—Prospective Damage—Injunction or Damages—Injury capable of adequate Compensation in Damages—Jurisdiction of Court—Chancery Amendment Act, 1858 (*Lord Cairns' Act*) (21 & 22 *Vict. c.* 27), *s.* 2.

In an action brought by the plaintiff against the defendant society for an injunction and damages in respect of an alleged obstruction of ancient lights, Romer J. found that the defendants' buildings when completed would cause an actionable obstruction to the plaintiff's lights, but that no such obstruction had yet taken place, and he expressed the opinion that the interference with the plaintiff's legal rights when the building was completed would be small, and could be adequately compensated by damages, but held, contrary to his own opinion, that he was bound by the opinion of the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* (1889) 43 Ch. D. 316, that there was no jurisdiction under Lord Cairns' Act to give damages in lieu of an injunction where the injury was threatened but had not been sustained, and he therefore granted an injunction. The Court of Appeal, without going into the merits, by a majority, upheld the view that the Court had no jurisdiction in such a case to award damages in lieu of an injunction. The House of Lords, by a majority, reversed this decision,

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and remitted the case to the Court of Appeal to deal with it on its merits:—

Held, that the findings of Romer J. brought the case within the "good working rule" suggested by A. L. Smith L.J. in *Shelfer* v. *City of London Lighting Co.* [1895] 1 Ch. 287, 322, as that which might guide the Court in exercising the discretion given it by Lord Cairns' Act to award damages in lieu of an injunction; that that was still the rule to be adopted by the Court as a guide and was not affected by anything that was decided in *Colls* v. *Home and Colonial Stores* [1904] A. C. 179.

Held, therefore, that, there being evidence to support the findings of Romer J., the injunction granted by him, contrary to his own opinion, ought to be discharged, and in lieu thereof an inquiry directed as to damages.

Decision of Romer J. [1923] 1 Ch. 431 reversed.

APPEAL from the decision of Romer J. (1).

The plaintiff was the owner and occupier of three small buildings known as Nos. 2, 3 and 4 Albion Square, in the City of Leeds. Upon these premises and certain adjoining premises belonging to his wife and situate in a street known as Upper Mill Hill, the plaintiff had since the year 1901 carried on his business of a wholesale and retail baker and confectioner. Each of these buildings, which was originally a cottage, consisted of a ground floor, first floor and second floor. On each floor was one room, lighted by one window overlooking Albion Square. Albion Square was in fact merely a narrow street or passage way running due north out of one of the principal business streets of Leeds known as Boar Lane, the plaintiff's buildings being on the west side of it. Some little way after passing the plaintiff's buildings Albion Square turned due east and, after passing, by means of an archway, under No. 15, Albion Street, ran into an important business thoroughfare called Albion Street, which the plaintiff and his employees without any question used and were entitled to use for the purpose of obtaining access to and from the plaintiff's buildings.

The defendants were the owners of Nos. 11, 13 and 15 Albion Street, and these premises backed upon and formed, for some distance, the eastern side of Albion Square. No. 11, which was 39 feet in height measured to the eaves, was

(1) [1923] 1 Ch. 431.

immediately opposite the plaintiff's building No. 2, the width of Albion Square at this point being only 8 feet 7 inches. No. 13, which was 55 feet in height measured to the eaves, was opposite to the plaintiff's buildings Nos. 3 and 4, the width of Albion Square here being 17 feet 9 inches or thereabouts. No. 15, which before the defendants' operations was of varying height, was further to the north, no part thereof being directly opposite to any of the plaintiff's buildings.

The position of Albion Square and the archway and the plaintiff's and defendants' buildings before the commencement of the defendants' building operations were conveniently shown on a plan prepared by one of the defendants' witnesses, and upon the model used at the trial of the action by both parties to the dispute. It was admitted that the plaintiff's nine windows were "ancient lights," subject however to this qualification. In the year 1915, when the plaintiff purchased his three cottages, his vendors were the owners of Nos. 11 and 13 Albion Street, and, by the conveyance to the plaintiff of September 2 of that year, it was agreed and declared (1.) that the plaintiff his successors and assigns should have the right at any time to increase the height of the buildings conveyed to him by three feet, and (2.) that the vendors their successors and assigns should have the right from time to time and at all times thereafter without interference on the part of the purchaser his successors in title or assigns to increase the height of No. 11 Albion Street to the present height of No. 13 Albion Street.

In the month of June, 1921, the defendants began pulling down No. 15 Albion Street, including the archway, with a view to rebuilding for the purposes of their business, and the demolition of this house was completed by December of that year. The erection of the new buildings on the site was begun in August, and by the month of May, 1922, the new buildings had been carried to a height of about 13 feet 9 inches. The position and dimensions of the new buildings as they will be when completed were clearly shown on the model and by a plan used at the trial, and it is unnecessary

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further to describe them in detail. It is sufficient for the present to say (1.) that the height of the new buildings where they abutted on Albion Square would be considerably in excess of that of the old buildings; (2.) that a portion of the new building (called on the plan New Building M) would extend on the first floor level right across Albion Square from east to west, the result of this extension being that that part of Albion Square which ran in a northerly direction would, for about 17 feet of its length, now pass under an archway instead of being as formerly open to the air; (3.) that the new building would extend on the first floor level across that part of Albion Square that ran in an easterly direction for the whole of its length, the result of this extension being that the archway by which access was obtained from Albion Square into Albion Street would be some 57 feet in length instead of some 22 feet as formerly.

In consequence of the defendants' operations the plaintiff, who was apprehensive that his rights of way, light and air would be encroached upon, consulted his solicitors, and they, on May 1, 1922, wrote a letter to the defendants asking for an appointment to examine the defendants' building plans. The plans were accordingly produced for the inspection of the plaintiff's solicitors and architect on May 9. By letter of May 10, 1922, the plaintiff's solicitors, after stating that the plans revealed a very serious situation for their client, asked the defendants to refrain from proceeding further with their building operations. This the defendants declined to do, and on May 15, 1922, the plaintiff issued his writ in the present action for an injunction to restrain the defendants from adding to their buildings so as to obstruct his ancient lights and served a notice of motion for an interlocutory injunction.

When the motion came before Romer J. the defendants gave an undertaking until the trial not to erect any buildings west of a line drawn north and south 40 feet from Albion Street, higher than the former building No. 15 Albion Street, and it was arranged that the action should, at an

early date, be tried before Romer J. without pleadings on the issues raised in the affidavits filed on the motion.

On July 5, 1922, the defendants paid the sum of 300*l.* into Court, and on the same day their solicitors wrote to the plaintiff's solicitors the following letter: "We beg to inform you that we have to-day paid into Court to the credit of this action the sum of 300*l.* and we enclose the bank slip. In this action there being no pleading it has not been possible for us to adopt the usual procedure of payment into Court with defence denying liability, as you will appreciate that such procedure is only possible where a defence is delivered denying liability. We have, however, to inform you, that the payment in is to be deemed the same as if a defence had been delivered denying liability, namely, against all the claims of the plaintiff, but denying liability."

The action was heard with witnesses before Romer J. on July 11, 12, 13, 14, 17, 18, 19, 20, 21 and 25, 1922.

On October 19, 1922, Romer J. delivered a considered judgment, in which he found that the defendants' buildings when completed would cause an actionable obstruction to the plaintiff's lights, but that no such obstruction had yet taken place, and he expressed the opinion that the interference with the plaintiff's legal rights when the buildings were completed would be small, and could adequately be compensated by damages, but held, contrary to his own opinion, that he was bound by the opinion of the Court of Appeal in *Dreyfus* v. *Peruvian Guano Co.* (1), that there was no jurisdiction under Lord Cairns' Act to give damages in lieu of an injunction where the injury was threatened but was not sustained, and he therefore granted an injunction.

The Court of Appeal (2), without going into the merits, by a majority (Lord Sterndale M.R. and Warrington L.J.; Younger L.J. dissenting), upheld the view that the Court had no jurisdiction to award damages in lieu of an injunction in a case of threatened injury.

On appeal to the House of Lords (sub nom. *Leeds Industrial Co-operative Society, Ld.* v. *Slack* (3)) the House, by a majority

(1) 43 Ch. D. 316. (2) [1923] 1 Ch. 431. (3) [1924] A. C. 851.

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(Earl of Birkenhead, Viscount Finlay and Lord Dunedin; Lord Sumner and Lord Carson dissenting), after consideration, allowed the appeal, and directed that the case should be remitted to the Court of Appeal to be heard on its merits.

The appeal was accordingly restored to the list and was heard on June 4, 5, 23, 24, 1924.

By arrangement between the parties and with the sanction of the Court the appeal was opened by counsel for the respondent.

Hughes K.C. and *J. E. Harman* for the respondent.
Cunliffe K.C. and *W. E. Vernon* for the appellants.
The arguments sufficiently appear from the judgments.

POLLOCK M.R. This is an appeal which comes before us under somewhat special circumstances. The plaintiff is the owner of certain premises in the central part of the City of Leeds, in respect of which he is entitled to ancient lights. He has brought his action against the Leeds Industrial Co-operative Society, Ld., to restrain them from adding to buildings owned by them so as to obstruct his ancient lights.

Now it is important in a sentence or two to recall the actual facts. In the month of June, 1921, the defendants began pulling down No. 15 Albion Street, which is part of their premises not quite exactly opposite to but rather to the north of the plaintiff's premises. The plans which the defendants intended to carry out by way of rebuilding after they had pulled down No. 15 Albion Street had been deposited with and approved by the City Council early in 1921. So that from the early part of 1921, and certainly in June, 1921, there had, I think, under the Building Acts which apply, been an opportunity for the plaintiff to find out what was the nature of the plans and whether they prejudiced his rights. But at any rate from June, 1921, the plaintiff had actual demonstration that something was going on in proximity to his premises, because the pulling down of No. 15 was commenced in that month.

The defendants commenced to erect their new buildings

upon the site, which had been partially cleared in the way I have mentioned, in August, 1921, but it was not until May 1, 1922, that the plaintiff wrote to the defendants for an appointment to examine the defendants' building plans. They were examined on May 9, and on May 15, 1922, the writ in the action was issued. An application for an interlocutory injunction was then made, and upon the motion coming before Romer J. an undertaking was given by the defendants until the trial not to erect any buildings west of a line drawn north and south 40 feet from Albion Street higher than the former building No. 15 Albion Street.

It was arranged that the action should be tried at an early date, and accordingly in the latter part of July, 1922, on nine days in that month, the case was heard by Romer J., who took time to consider his judgment, which he delivered on October 19, 1922. He found that an actionable wrong had been committed by the defendants—actionable, that is to say, in the sense that it gave a cause of action to the plaintiff —and he expressed the opinion that if there was jurisdiction under Lord Cairns' Act to give damages in lieu of an injunction he would in the exercise of his discretion have granted damages and not an injunction ; but as he came to the conclusion upon the construction of the statute and the authorities binding upon him that he had no such jurisdiction he granted the injunction asked for.

An appeal was then brought to this Court, and this Court decided on the one point which was argued before them— namely, whether or not there was jurisdiction to award damages in lieu of an injunction where the injury had not been completed but was only threatened, and considering themselves bound by the same authorities as the learned judge, came to the conclusion that he was right in his decision as to the remedy available, and they held that the injunction ought to go. They expressed no opinion upon other parts of the case.

From that decision there was an appeal to the House of Lords, and upon May 30, 1924, the House of Lords gave their decision upon this same point, and by a majority, the

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learned Lords decided that there was power in the case of a threatened injury to grant damages in lieu of an injunction and remitted the case once more to this Court to be heard on its merits.

We have, therefore, heard argument as to whether the learned judge was right in finding for the plaintiff. Mr. Hughes has contended that the learned judge, quite apart from the question of what was the remedy, came to a conclusion which was not justified by the evidence, and that having found that there was an actionable injury, he ought to have made an order for an injunction without any alternative of damages, because an injunction was the only appropriate remedy to avert the contemplated injury to the plaintiff by the building of the defendants in accordance with their deposited plans.

In a sense Mr. Hughes, who appears for the plaintiff, is in a curious position, because there might be some question whether or not he had the right to begin, but as between the members of the Bar conducting the case it has been found convenient, and the Court has also found it convenient, that Mr. Hughes should put his case first of all before us, and he has done so. We have therefore to give our decision upon the question whether or not we agree with the learned judge in holding that this is a case in which the remedy appropriate for the actionable wrong done by the defendants is by an assessment of damages. Upon that point, after careful consideration, I have come to the conclusion that the learned judge's view is right.

It is necessary to refer more particularly to what the learned judge decided. The case, as I have said, took a long time before him, and he gave a considered judgment. The plaintiff's premises are situated in a busy central part of Leeds, where he carries on an old-established confectionery business. It has, no doubt, a considerable goodwill attached to it, which renders the actual site important to the business. To suggest that there could easily be a reinstatement of the business elsewhere would be to overlook the fact that the plaintiff's business has been carried on for a great number of

years in this particular place where the plaintiff and his business are well known. The defendants are intending to build very large premises in proximity to the plaintiff's buildings, and the learned judge has found, and to my mind rightly found upon the evidence, that there will be, when those premises are completed, a deficiency of light coming to the plaintiff's windows in respect of which the plaintiff is prima facie entitled to complain. The learned judge has also found that, although the cause of action has been established, the amount of interference with the plaintiff's legal rights will be small, and also that it will be capable of being estimated in money, and further, that the plaintiff could adequately be compensated by damages. He has also found that it would be a hardship on the defendants to prevent them using their building site, as proposed, to the best advantage of their business, when no harm will be done to the plaintiff beyond that for which he can be readily and adequately compensated in damages.

Mr. Hughes has argued before us that once the learned judge has found that there is a good cause of action vested in the plaintiff we may sever that from the other portions of the learned judge's findings, and that in spite of them the remedy, according to the cases, ought to lie in the grant of an injunction. I desire to say for myself that I do not think it right to regard the judgment of Romer J. as severable in its findings. I think it must be taken as a whole. He has found that there was a good cause of action in the plaintiff, but at the same time it is clear that it was not easy for him to make up his mind whether that was so or not, and in the process of coming to that conclusion he formed the opinion that the injury to the plaintiff's rights would be small. I do not think therefore that we can say that the fact that he has found a good cause of action in the plaintiff involves that it was not right for him to find also that the injury is small and capable of being estimated in damages. It is said that, now that *Colls' Case* (1) has decided that in order for a plaintiff to succeed

(1) [1904] A. C. 179.

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it must be found that he has a good cause of action on the ground of injury as from a nuisance, the learned judge, having found that there is a good cause of action, must have found that there was a substantial cause of action to be dealt with by an injunction only. That criticism may be, in proper and appropriate cases, well founded, but in the present case the learned judge has, in my opinion, intended to present his judgment in this form: that there is a legal cause of action in the plaintiff, a legal cause of action which is sufficiently substantial to justify some exercise of the Court's powers in his favour, and yet it is a cause of action the quantum of which is small, the character of which is that it is capable of being estimated in money and adequately compensated by damages; and he has added a definite finding upon materials placed before him by the defendants, that it would be a hardship on them to prevent them using their building site.

Now it is plain that during the nine days on which the case was before him, the learned judge had abundant evidence on which he could come to those conclusions. Indeed, I think I should myself have come to the same conclusions. It is clear, in my judgment, that the plaintiff established a cause of action, but having regard to the situation of the premises and to a number of facts which I need not catalogue at the moment, it appears to me that the injury in this part of the City of Leeds to the plaintiff's legal rights will be small. In my opinion, therefore, the injury is one capable of being estimated in money and compensated for by damages. Further it would be a serious matter to prevent the defendants using their site having regard to the nature of the buildings adjoining or in proximity to the plaintiff's buildings and the natural development of an industrial town like Leeds.

If that be so, the question then arises, having regard to the fact that there is a good cause of action in the plaintiff, is the matter one in which the learned judge's discretion can be judicially exercised in favour of granting damages rather than an injunction? Mr. Hughes, in a very careful

and useful survey of the cases, has taken the point of law, and it will appear from the authorities he cited, and in particular from *Shelfer* v. *City of London Electric Lighting Co.* (1), that the general rule is that where a right is invaded an injunction will be granted, and to escape that rule the case must be brought within some exception. He called our attention to the following passage from the judgment of A. L. Smith L.J. (2): "In such cases the well-known rule is not to accede to the application"—that is, for a mere assessment of damages—"but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction." Mr. Hughes also called our attention to the observations which will be found in some of the cases which he cited, which are quite emphatic, that it is wrong in principle to afford an opportunity to a defendant to invade the rights of the plaintiff merely upon the terms of paying damages, because the rich defendant may be able to do a high-handed act and invade the rights of his adjoining owner and be content to pay damages if called upon to do so by the judge. Lindley L.J. and A. L. Smith L.J., and from time to time many other judges, have said that that is wrong. If a right has been infringed prima facie there is a remedy available to the plaintiff, a remedy which can be enforced by an injunction. It is quite an improper view to hold that, at a price, a defendant can do something which is a wrong to his neighbours. Lord Finlay makes reference to the point in his speech in the House of Lords in the present case. He says (3): "It has been urged as an objection to the construction of Lord Cairns' Act above stated"—that is, that damages can be granted instead of an injunction where the injury is not complete—"that it would give the Chancery Courts power to legalise the commission of torts by any defendant who was able and willing to pay damages. The Courts have on more than one occasion expressed their determination to prevent any abuse of the

(1) [1895] 1 Ch. 287. (2) [1895] 1 Ch. 322.

(3) [1924] A. C. 851, 860.

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Act in this direction. It is sufficient to quote two passages from the reports on this subject." And he quotes from the judgment of Lindley L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (1) (I have quoted from that of A. L. Smith L.J. in the same case (2)), and he also quotes from the judgment of Buckley J. in *Cowper* v. *Laidler.* (3) But although there is, therefore, a prima facie right to the injunction, it is pointed out by Lindley L.J. and by A. L. Smith L.J. that there are cases in which the rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by s. 2 of Lord Cairns' Act. It appears to me that the rules in which the relaxation may be permitted have been stated with sufficient clearness in *Shelfer* v. *City of London Electric Lighting Co.* (4) and in *Aynsley* v. *Glover* (5) ; and I should be very sorry to say anything which might suggest any doubt as to whether those rules were still the rules which are to be looked at for guidance in these difficult cases. In *Shelfer's Case* (1) Lindley L.J. says that, although an injunction ought generally to be taken as prima facie the remedy, yet damages may be given, but that damages ought not to be given except under very exceptional circumstances, and he gives instances of them. A. L. Smith L.J. states the rule in this way (2) : " In my opinion, it may be stated as a good working rule that—(1.) If the injury to the plaintiff's legal rights is small, (2.) and is one which is capable of being estimated in money, (3) and it is one which can be adequately compensated by a small money payment, (4.) and the case is one in which it would be oppressive to the defendant to grant an injunction :—then damages in substitution for an injunction may be given."

Now a word or two ought to be added upon what is the meaning of " if the injury to the plaintiff's legal rights is small." A. L. Smith L.J. himself in a subsequent passage in his judgment in the same case says (6) : that the question of

(1) [1895] 1 Ch. 287, 316.
(2) Ibid. 322.
(3) [1903] 2 Ch. 337, 341.
(4) [1895] 1 Ch. 287.
(5) (1874) L. R. 18 Eq. 544.
(6) [1895] 1 Ch. 323.

what is a small injury or what may be the sum which would be adequate in compensation must be taken in their true perspective, and he adds, "An injury to the plaintiff's legal right to light to a window in a cottage represented by 15*l.* might well be held to be not small but considerable." Lord Macnaghten in *Colls' Case* (1) also refers to this question and says: "I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test," and he adds—and this is of importance—"But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction." Those words no doubt are obiter, but every lawyer will desire to pay respect to observations made by so great a judge.

The rules that are laid down in *Shelfer* v. *City of London Electric Lighting Co.* (2) are also to be found in *Aynsley* v. *Glover* (3), if not in the same terms, at any rate in words to much the same effect, by Sir George Jessel M.R. He says, quoting from the judgment of Giffard L.J. in *Staight* v. *Burn* (4): "I take the course of this Court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, this Court will interfere by injunction." He takes that as the starting point, and then proceeds to consider whether there can be any modification of that rule, and he says (5): "As I understand it, the rule now is—and I shall so decide in future, unless in the meantime the Appeal Court shall decide differently—that wherever an action can be maintained at law and really substantial damages, or perhaps I should say considerable damages (for some people may say that 20*l.* is substantial damages), can be recovered at law, there the injunction ought to follow in equity; generally, not universally, because I have something

(1) [1904] A. C. 179, 193.
(2) [1895] 1 Ch. 287.
(3) L. R. 18 Eq. 544, 547.
(4) (1869) L. R. 5 Ch. 163, 167.
(5) L. R. 18 Eq. 544, 552, 553.

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to add upon that subject." He then goes on to say (1): that there is a discretion, and that in cases where damages would be sufficient there the Court may exercise its discretion, because the words of the section are, "If it shall think fit"—to substitute damages in some one or more of the cases in which, before the passing of the Act, this Court would have granted an injunction. Then he goes on to declare, what is now clearly the practice, that the choice between an injunction and damages is a matter of discretion. He says (2): "I am not going, and I do not suppose any judge will ever do so, to lay down a rule which, so to say, will tie the hands of the Court. The discretion, being a reasonable discretion, should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised." *Aynsley* v. *Glover* (3) preceded *Shelfer* v. *City of London Electric Lighting Co.* (4), but the latter case was the development and writing out in plainer words of what were the rules which Sir George Jessel intended in the former case to lay down as guiding the discretion of the Court.

It is said that the decision of the House of Lords in *Colls' Case* (5) has made some inroad upon those rules, and that some different canons are now to be applied. For my part I do not think so. In my opinion, when that case is looked at it will be seen that it definitely intended to lay down that the question of choice between an injunction and damages was still one which was for the exercise of the discretion of the Court, because Lord Lindley—who had been a party both to the decision in *Shelfer's Case* (4) and to that in *Martin* v. *Price* (6)—there speaks of the difficulty which must always be presented to the Court when this choice is open to it. He says (7): "There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is the uncertainty as to whether the proper

(1) L. R. 18 Eq. 554.
(2) Ibid. 555.
(3) L, R. 18 Eq. 544.
(4) [1895] 1 Ch. 287.
(5) [1904] A. C. 179.
(6) [1894] 1 Ch. 276.
(7) [1904] A. C. 179, 213.

remedy is an injunction or damages." But he had previously said (1): "The general rule that where a legal right is continuously infringed an injunction to protect it ought to be granted is subject to qualification, as was carefully explained by Sir George Jessel in *Aynsley* v. *Glover* (2), and more recently by Court of Appeal in *Shelfer* v. *City of London Electric Lighting Co.* (3)" It seems to me, therefore, when one looks at the judgment in *Colls' Case* (4) it is quite clear that side by side with that judgment there is an intention to maintain and uphold the rules laid down in *Aynsley* v. *Glover* (2) and *Shelfer* v. *City of London Electric Lighting Co.* (3); and the decision of the House of Lords in the present case is to the same effect.

Turning to the present case, I have now to consider whether or not the learned judge has exercised a right and proper discretion upon the materials before him. He has, after a prolonged trial, adopted in terms the findings which were laid down by A. L. Smith L.J. as enabling the Court to discover a right test as to whether in such a case it may grant damages instead of an injunction. I do not, for the reasons I have given, think it possible to set aside those findings, indeed, as I have said, I agree with them. I think therefore that the learned judge has correctly applied the rules, and has come to the conclusion that this is a case for damages and not for an injunction. The House of Lords has said that in such a case as the present damages may be granted instead of an injunction, and therefore the order for injunction ought to be dissolved and an inquiry as to damages directed.

WARRINGTON L.J. This is an appeal from an order of Romer J. whereby, in an action for an injunction restraining interference with ancient lights, he granted an injunction restraining the defendants from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows as the same existed previously to the taking

(1) [1904] A. C. 179, 212.
(2) L. R. 18 Eq. 551 et seq.
(3) [1895] 1 Ch. 310, 314, 316, 322.
(4) [1904] A. C. 179.

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down of the buildings which formerly stood on the site of the defendants' new buildings.

The defendants served a notice of appeal, asking that that judgment might be reversed, and that the action, so far as it had not already been decided in their favour, might be dismissed with costs. When the appeal came before this Court it was soon found that the real question was whether an injunction should be granted, or whether the relief should be confined to the alternative relief of damages in lieu of an injunction. The learned judge, in giving judgment as he did in favour of the plaintiff, had expressed the view that if he had had jurisdiction so to do he would himself have regarded the case as one for damages rather than for an injunction, but being of opinion that he had no jurisdiction to award damages in lieu of the injunction he granted an injunction as the only form of relief he could give.

The point was this. The defendants' buildings had not actually been erected, and no actual wrong had been committed at the time the action was commenced, and the injunction sought for and ultimately obtained was to restrain an apprehended interference. It was contended successfully before Romer J. and before this Court that in such a case Lord Cairns' Act, which enabled the Court to give damages in lieu of an injunction, did not go so far as to enable it to substitute damages for an injunction to restrain an apprehended wrong. The decision of this Court was reversed by the House of Lords, who have now held that there is jurisdiction even in the case of an apprehended wrong to award damages in lieu of an injunction. The question we have now to determine is whether effect ought to be given to the opinion of Romer J., to which at the time he conceived himself unable to give effect, or whether the plaintiff is entitled to the relief by injunction.

The defendants to-day no longer dispute, though by their notice of appeal they did, the findings of the learned judge, that their buildings when completed will cause an actionable interference with light. All that they ask us now to do is to discharge the injunction, and to substitute for it

an inquiry as to damages, or rather, to be more accurate, to award damages the amount of which will be ascertained by answer to an inquiry.

The material facts found by the learned judge—I mean the facts material on the only question which remains before us—are stated by him in his judgment as follows (1) : " I am convinced that, if the defendants' buildings had been completed, this would be a case in which, guiding myself by what was said by A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (2) and by Lord Macnaghten in *Colls* v. *Home and Colonial Stores* (3), I should have given damages in lieu of an injunction." And then he finds the facts in these terms : " To start with, the interference with the plaintiff's legal rights will in my opinion be small and capable of being estimated in money. In the next place, the plaintiff could be adequately compensated by damages." And finally (4) : " It seems to me that it would be a hardship on the defendants to prevent them using their building site, as proposed, to the best advantage of their business, when no harm will be done to the plaintiff beyond that for which he can be readily and adequately compensated in damages."

Now those findings unquestionably bring the case within the " good working rule " suggested by A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (5) as that which might guide the Court in exercising the discretion given to it by Lord Cairns' Act to award damages in lieu of an injunction. Those facts were found by the learned judge expressly for the purpose of enabling him to express the view that, if he had had jurisdiction so to do, he would have awarded the alternative relief.

The plaintiff before us questions the accuracy of those findings. The learned judge expressed his opinion on the facts after a careful examination of the evidence as stated in his judgment, and we are therefore capable, from the judgment below, of judging of the force of the evidence on which he

(1) [1923] 1 Ch. 431, 432.
(2) [1895] 1 Ch. 287.
(3) [1904] A. C. 179.
(4) [1923] 1 Ch. 431, 433.
(5) [1895] 1 Ch. 287, 322.

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acted. And it has not been suggested, or at any rate nothing has been said which in any way suggests to me, that there is something else in the evidence not referred to by the learned judge which would displace those findings. What he has noted as the evidence on which he has acted is, in my opinion, sufficient to support his findings, and I think I may say without hesitation that I should myself have come to the same conclusion. But that is not necessary. There are the findings of the learned judge, and no reason has been given sufficient, in my opinion, to justify us in interfering with them.

But then it is said that even with those findings one ought not to substitute damages for the injunction. Now the rule—and I think it is still the rule—is stated by A. L. Smith L.J. himself in *Shelfer's Case* (1) in these terms: "Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction." It has been said on the part of the defendants that the stringency of that statement of the law has been relaxed by what was said by Lord Macnaghten and by Lord Lindley in *Colls* v. *Home and Colonial Stores*. (2) I do not think that is so. I think the rule remains where it was. The jurisdiction which the Court has must be exercised upon the same principles as those which guided the Court in its exercise before the decision in *Colls' Case* (2); but it is to be observed that A. L. Smith L.J. himself in dealing with the matter in *Shelfer's Case* (1) has suggested the good working rule as one to be applied under the stringent restrictions to which he had already expressed his adherence. Therefore I think

(1) [1895] 1 Ch. 287, 322. (2) [1904] A. C. 179.

we may quite safely act under that "good working rule," and we are not concerned to say whether or not since *Colls' Case* (1) it is easier to obtain the substitution of damages than it was before.

Now the "good working rule" is stated by A. L. Smith L.J. in these terms (2): "(1.) If the injury to the plaintiff's legal rights is small, (2.) And is one which is capable of being estimated in money, (3.) And is one that can be adequately compensated by a small money payment, (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction; then damages in substitution for an injunction may be given." As I have already said, the learned judge has found, and I agree that his findings were justified by the evidence, that the case comes within that rule. It is true that he does not express the fourth of the conditions in quite the same way as it is expressed by A. L. Smith L.J., but his finding as to hardship to which I have already referred (3) is equivalent to the fourth element referred to by A. L. Smith L.J.

It seems to me, therefore, that now that we know we have jurisdiction to substitute damages for an injunction we ought to do so, thereby doing that which Romer J. would have done if he had thought he had jurisdiction to do so.

The order therefore—I am only expressing this in general terms, for the terms of the order will certainly have to be carefully settled after discussion—will be to discharge the order of Romer J. except so far as it deals with the costs of the action, and then after a declaration as to the plaintiff's rights to direct an inquiry as to damages.

SARGANT L.J. I am of the same opinion. Since the judgment of the House of Lords in this case, all that we have to consider is, whether there are circumstances sufficient to justify the Court in substituting relief by way of damages for what may be called the prima facie normal relief by way of injunction; and for that purpose I think one may take, as

(1) [1904] A. C. 179. (2) [1895] 1 Ch. 287, 322.
(3) [1923] 1 Ch. 431, 433.

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the learned judge has taken, the requisites which are set out as forming a good working rule in the judgment of A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* (1)

Now the first of those requisites is: "if the injury to the plaintiff's legal rights is small." On that point I think Mr. Hughes' argument put the rights of the plaintiff in an ancient lights case too high. Substantially he said: No relief at all since *Colls' Case* (2) can be granted unless the damage has been substantial. That being so, the fact that any relief at all can be granted negatives the possibility of the injury to the plaintiff's legal right being small, and therefore in the case of obstruction to light a plaintiff never can get damages substituted for an injunction unless the Court finds that the plaintiff's object was extortion. I think that is misapprehending the effect of *Colls' Case.* (2) In my judgment there is still left a border line of cases with regard to the obstruction of light where the injury may be sufficiently substantial to justify some relief, and yet may be of so comparatively small a character as to be properly and adequately compensated by damages.

In this case, apart from the circumstances on which the learned judge has relied in this respect—circumstances which I think by themselves would have caused me to take the same view as the learned judge—there is in my opinion this very material circumstance to be considered which is special to this case. The cottage in respect of which the plaintiff is suing belonged in the year 1905 to the owners of the two houses or warehouses, Nos. 11 and 13 Albion Street, which were immediately opposite. At that time and ever since the main obstruction to the light coming to the plaintiff's windows has throughout been caused by the warehouses which were on the land in the common ownership. Further than that, the plaintiff assented to an arrangement by which to some extent even the light that he had was to be diminished, because the vendors were to be entitled to raise the height of the building No. 11 to the height of the building

(1) [1895] 1 Ch. 287, 322. (2) [1904] A. C. 179.

No. 13. The obstruction which is complained of is an obstruction to purely lateral light. From the window most affected the whole of this lateral obstruction falls within an angle at the most of 41 degrees. That is in the case of the windows of No. 4. In the case of the windows of No. 3 and No. 2 the angle is very much smaller. I think that in considering whether the injury to the plaintiff's right is great or small one must take into consideration the fact that unless the main light to the plaintiff's property had been taken away by virtue of the acts of the owners of the property immediately opposite—whose acts were acquiesced in and not disputed by the owners of the plaintiff's property—unless one is to take that into account—one will be allowing the plaintiff to get an extra right in respect of the lateral light coming to him over the defendants' premises beyond that to which he would be entitled if there had not been this direct obstruction of light by the predecessors in title. I think that is not right. I adhere to what I said in *W. H. Bailey & Son, Ld.* v. *Holborn and Frascati, Ld.* (1) It had been there argued that if an obstruction had once been permitted at all to some part of the light, the right to prevent any obstruction in respect of light over any other adjoining building was gone altogether. I did not assent to that argument, but referring to a passage in Gale on Easements, 8th ed., p. 547, I said (2): "Converting that passage from a negative proposition into a positive proposition and applying it not to an alteration of a window but to an alteration in the light coming over adjoining property brought about with the assent or permission of the owner of the dominant tenement, it seems to me that it is true to say that an abstraction of light coming over adjoining property acquiesced in or consented to by the owner of the dominant tenement does not entirely negative his right to an easement of light over other adjoining property"—and this is the part that is material—"though it does not give him any further right over that second adjoining property so as to prevent the erection of a building

(1) [1914] 1 Ch. 598. (2) Ibid. 602.

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which he could not have prevented had he not assented to the prior abstraction of light over the first adjoining property." In my judgment if the building of the warehouses Nos. 11 and 13 had been of such a height as to allow the ordinary access of light over the building, direct light to the plaintiff's windows, the result would have been the abstraction of light by the collateral building would have been comparatively slight.

Turning to the second and third requisites mentioned by A. L. Smith L.J. as to the damages being capable of being estimated in money and adequately compensated, I see no reason why there should be any particular difficulty in estimating the amount of the damages in this case, or that the damage could not be adequately compensated by money. There is no direct personal right interfered with such as was the case in *Shelfer's Case*. (1) There is no question here of a person having to sleep away because of being kept awake by a nuisance. The damage here is purely and simply a damage to property, and a damage which I think is very easily capable of estimation in the ordinary way.

Turning now to the last requisite—the case being one in which it be oppressive to the defendant to grant an injunction —I must say that having regard to all the circumstances of this case and to the facts that are stated by Romer J. in his judgment as to the dates when the defendants submitted their plans and when they began their pulling down and so on, I think that the result of granting an injunction as distinct from damages would be to inflict upon them a very real and substantial hardship. One has to consider this: Here is a plaintiff who has a small cottage, in what is practically almost a well at the present time, in the central part of Leeds, enjoying nothing like the ordinary amenities of life such as are enjoyed elsewhere, and naturally suffering from a disadvantage of that kind—a disadvantage which, as I have said, has been caused to a large extent by the action of the persons who were at one time the common owners of the property in question and of the property opposite, or by their

(1) [1895] 1 Ch. 287, 317.

predecessors in title. I cannot myself think that a person in that position, using a property of that kind for the purposes for which it is now being used, is in a position to say that his present enjoyment of that light which he has, without any substantial diminution, is so much of a personal right and so disconnected from pounds, shillings and pence that he ought to be at liberty to prevent a considerable building scheme which is appropriate to the nature of the locality, and which at the worst will make no very substantial difference in the use of the property for the purposes for which it is used other than such as can be adequately measured by a money compensation.

I think, therefore, that the learned judge was right in the view that he adopted as to the way in which he should exercise a discretion which it now appears is exercisable, and I concur in the order as suggested by Warrington L.J.

Injunction discharged and inquiry as to damages directed.

Solicitors for appellants: *McKenna & Co., for Pettitt, Carter & Wade, Leeds.*

Solicitors for respondent: *Jaques & Co., for Bointon, Son & Malcolm, Leeds.*

W. I. C.

C. A.
1924
RUSSELL
J.
Feb. 21, 22.

C. A.
June 30;
July 1.

In re ALLOTT.

HANMER *v.* ALLOTT.

[1923. A. 1619.]

Power—Will—Annuity to Daughter for Life, then to her Husband for Life—Deed of Family Arrangement—Power in Deed to lease in order to provide Annuity—Provisions of Will incorporated in Deed—Husband of Daughter not necessarily in esse at Execution of Deed—Perpetuity—Power void ab initio.

A testator by his will directed his trustees to stand possessed of all the mines and minerals beneath the surface of his residuary real estate, and of the rents and profits thereof on trust to pay perpetual annuities to his daughters. The daughters were parties to a deed of family arrangement under which power was given to trustees to manage or lease the mines and minerals in order to provide the moneys necessary to pay the annuities. Under the will, the trusts of which were to be treated as incorporated in the deed, the surviving husband of any daughter was entitled for his life to the annuity given to his wife by the will, and the deed contemplated the exercise of the power of leasing during the life of the surviving husband, who was not necessarily a person who was alive at the date of the execution of the deed:—

Held, by Russell J. and the Court of Appeal, that, as the trustees might have exercised their power of leasing so as to create for the first time a new interest in land after the perpetuity period had expired, the power of leasing was void.

ADJOURNED SUMMONS.

John Allott, who died on August 7, 1888, by his will dated July 6, 1882, directed his trustees to accumulate the rents and profits from his estate until March, 1893, and to stand possessed thereof on certain trusts and "from and after the expiration of the said accumulation period stand possessed of all the mines and minerals situate beneath the surface of the lands forming part of my residuary real estate and of the rents royalties and profits to accrue in respect of the said mines and minerals until the sale thereof and also of the proceeds of sale of the said mines and minerals upon trust to set apart and pay thereout rateably the following annual sums as perpetual annuities in the nature of personal estate." The testator then stated the annual sums which were to be paid to his unmarried daughters

Sarah Frances and Elizabeth Ann, to his married daughters Catherine Mary and Marianne, and to his sons Henry and Robert. The testator then directed that the annuities to his daughters were to be held upon the trusts and subject to the provisions declared earlier in his will in respect of the daughters' shares in a particular fund called the accumulated fund. Under the trusts of that fund each daughter was to receive the annuity income from 3000*l.* for life, and from and after the death of each daughter the trustees "shall stand possessed of such daughter's share in the accumulated fund on trust to pay the income thereof to the husband (if any) of each such daughter for life." Subject to the trust for accumulation and the annual sums directed to be set apart out of the said mines and minerals, and to the principal sums directed to be set apart out of the proceeds of sale of the said mines and minerals, the testator directed his trustees to stand seised and possessed of his residuary real estate upon trust for John George Allott, testator's eldest son, and his assigns during his life, and then followed testator's other sons in strict settlement in tail male. The will did not in terms dispose of the surplus rents and profits before sale.

John George Allott knew that the testator's intention was that the surplus rents and profits of the mines should go, as the surplus proceeds of sale were directed to go, in equal shares to himself and his brothers Robert and Henry, and that they were not intended to fall into the residuary devise of the real estate, and accordingly he divided them in equal shares. When Hugh, the eldest son of John George, attained the age of twenty-one the entail was barred, and a deed of family arrangement was entered into, dated December 9, 1894, the three sons and the two unmarried daughters being parties to it, in order to correct the mistakes in the will. The deed provided for the conveyance of "All the beneficial interest of them, the said conveying parties in all the mines beds veins and seams of coal and fireclay whether open or not opened in and under the said Yorkshire estates . . . . not however so as to include in but on the

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contrary excepting out of the conveyance hereby made and reserving "—to the trustees—" in fee simple, as trustees of the said will, the legal estate in all the said coal and fireclay. . . . . To hold the premises"—unto the three sons—" in fee simple . . . . and as to the said coal and fireclay subject to the rights of the said four daughters of the said testator and of the trustees of the said will with reference thereto under the trusts of such will."

The deed contained a power of management and a power for the trustees to work the mines for profit, and a power to lease as follows: "And may from time to time or at any time grant any leases not exceeding 99 years of all or any of such mines beds veins and seams of coal and fireclay and whether opened or unopened and in each case upon such terms and conditions as to rents royalties and reservations (and as to rent whether by way of sliding scale or otherwise) . . . . as to the trustees or trustee may seem proper." Then followed the beneficial trusts in favour of the beneficiaries—namely, to pay annual sums to the daughters and sons of the testator, and to his grandson Hugh. The trustees and the three sons were given power to redeem the annual sum payable to Hugh at a price to be ascertained as therein mentioned. The trustees were then to divide the surplus profits of each year and pay them to the three sons on the footing of their being absolutely entitled to the said mines in equal shares as tenants in common in fee simple subject only to the payment of the aforesaid annual sums.

All the children of the testator, except Elizabeth Ann, a spinster, were now dead.

The summons asked (inter alia) whether on the true construction of the deed of family arrangement the power given to the trustees for the time being thereof to grant leases not exceeding 99 years of the mines and minerals thereby settled was valid or whether it was void as infringing the rule against perpetuities.

The summons came on for hearing before Russell J. on February 21, 1924.

A. Grant K.C. and *Russell Gilbert* for the trustees. It is submitted that the power of granting leases given to the trustees is good. It is true that in form the power is unlimited as to time, but the effect of the deed and the will is that mines and minerals belong absolutely to the three sons of the testator subject to the payment of the perpetual annuities.

These three absolute equitable owners are undertaking to manage the mines in order to provide an annuity for Hugh Allott, who abandoned all interest in the mines. There was power to buy him out at any time. They could at any time put an end to the annuity, and that is the test as to whether it is void for perpetuity.

Powers of leasing are not generally expressly confined within the limits of the rule against perpetuities, although it is the practice so to restrict the exercise of powers of sale: Davidson's Precedents in Conveyancing, 3rd ed., vol. iii., part i., p. 570; Lewis on Perpetuities, p. 569. This power can be destroyed by the united act of all the persons interested during the period allowed by the rule against perpetuities and is therefore good: *Boyce* v. *Hanning* (1); *Wallis* v. *Freestone* (2); *Lantsbery* v. *Collier*. (3) There are no trusts in the deed for the annuities given to the daughters by the will. The trust to pay the annuities to surviving husbands is good, and it would be absurd to say that the power to grant leases in order to carry out the trust is bad. When Parker J. in *In re De Sommery* (4) speaks of a power capable of being exercised beyond lives in being and twenty-one years after he meant capable of being exercised in the sense that the absolute interests had not come into existence. If a power is unlimited in time the limit is the time when the absolute interests vest in possession: Farwell on Powers, 3rd ed., p. 40. At any time after the execution of the deed its trusts could be terminated if the trustees, or the three sons, provided the corpus necessary to produce the annuities.

Courthope Wilson K.C. and *Errington* for the presumptive tenant in tail in remainder under the settlement, and one of

(1) (1832) 2 Cr. & J. 334.
(2) (1839) 10 Sim. 225, 229.
(3) (1856) 2 K. & J. 709, 717.
(4) [1912] 2 Ch. 622.

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the trustees of the deed. The power to lease in the deed is good, because the trust to which it is attached must come to an end, or can be destroyed, within the limits fixed by the rule against perpetuities: Gray on Perpetuities, 3rd ed., § 490. Property may be given to an unborn person for life or to several unborn persons successively for life, with remainders over, provided such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities: *In re Ashforth.* (1)

The true limit is pointed out by the intent of the settlement: when the purposes of the settlement are spent, the power is no longer capable of being exercised; and this is so whether the power be one of sale or leasing: Farwell on Powers, 3rd ed., p. 128. Here the power is not spent, for after the husband's life estate the gift of the annuity is to the issue of the testator's daughter, who must be ascertained at her death. The power under the deed is not spent, because the trusts for the annuities under the will have to be satisfied and this deed is a trust deed to provide for them: *In re Dyson and Fowke.* (2)

Preston K.C. and *Horace Freeman* for the children of Henry Allott, and for Elizabeth Ann, a daughter of the testator. The trusts under the will are to pay the annuity to the daughter for life, then to her husband for life, and then to her issue. All those limitations are valid, even although the husband might be unborn at the date of the creation of the limitations: *In re Bullock's Will Trusts* (3); *In re Garnham.* (4) Under the deed the limitations affecting Hugh's annuity are strictly within the perpetuity period. The rule against perpetuities only requires that the trust may be capable of performance within the period required by the rule. The fact that there are in existence, or must come into existence within the rule, persons who can put an end to the trust is enough to make the power of leasing in the deed good. That is the case here, assuming the

(1) [1905] 1 Ch. 535, 540.
(2) [1896] 2 Ch. 720.
(3) [1915] 1 Ch. 493.
(4) [1916] 2 Ch. 413.

annuitants can require the annuities under the deed to be redeemed.

Jolly for Louisa Allott and Mrs. Chapman, respectively widow and daughter of John George Allott. The power of leasing contained in the deed is good: *Wood* v. *White*. (1)

Bennett K.C. and *Bryan Farrer* for Hugh Allott, tenant for life. The power of leasing is void ab initio, because there is no limit to the period during which it may be exercised. If it appears to be the intention that the power shall continue after the ultimate fee or absolute interest vests in possession, it is not void if it must be exercised within a reasonable time after lives in being, and if such time is less than twenty-one years. But if it is the intention that the power shall continue notwithstanding that the legal fee has vested in possession, and if the exercise of the power is not limited in the manner aforesaid, such power is void: Gray on Perpetuities, 3rd ed., p. 407. There is nothing on the face of the deed to limit the time during which the power may be exercised. According to the true construction of the deed the power is capable of being exercised beyond lives in being and twenty-one years after, and is therefore absolutely void: *In re De Sommery*. (2) You cannot have a power to change the nature of the interests limited by the instrument so as to exceed the rule against perpetuities. Accordingly the Courts have decided that powers, though framed in general terms, are limited by the nature of the limitations contained in the instrument, so that when the absolute interests come into existence the power is considered to be at an end: *Peters* v. *Lewes and East Grinstead Ry. Co.* (3); *Lantsbery* v. *Collier*. (4) Here the power of leasing was inserted in the deed to enable the annuities to be paid in perpetuity. The parties never intended that the power should come to an end the moment the absolute interests were ascertained.

The deed creates a fund out of which the annuities are to be paid to the daughters of the testator as directed by his will. The will provides that a surviving husband of any daughter

(1) (1838) 4 My. & Cr. 460.
(2) [1912] 2 Ch. 622, 630.
(3) (1881) 18 Ch. D. 429, 433.
(4) 2 K. & J. 709, 717.

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is to take the income for his life. He might not be a life in being at the date of the deed. The deed contemplates that the power of leasing should be exercised in order to provide the husband with the income for a period beyond a life in being and twenty-one years after, and therefore the power is void: *In re De Sommery.* (1)

RUSSELL J. [after stating the facts]. It seems to me clear that the trust for management and the power of leasing are given to the trustees only for the purpose of enabling them to carry out the trusts declared by the deed. There is nothing in the deed to limit the period during which the power may be exercised. Prima facie the power is a perpetual one and therefore bad. But the Court in such cases has construed such a power as limited, as to the period of time within which it must be exercised, to the duration of the trusts for the execution of which the power is given, that is to say, that when the trust comes to an end by the property becoming vested in an absolute owner the power itself at the same time ipso facto ceases. In such circumstances the question whether the power is, or is not, good depends upon whether or not the property becomes vested in an absolute owner within the limit of time allowed by the rules against perpetuities.

The result of the authorities is summed up by Sir George Jessel in *Peters* v. *Lewes and East Grinstead Ry. Co.* (2), a case in which he was considering the question of a power of sale. He said: "The first point which is considered by the Vice-Chancellor is a very curious point indeed: it is as to the time during which a power of sale given by a will will last. No doubt you cannot have a power of sale to change the nature of the interests limited by the instrument so as to exceed the limit of time prescribed by the rule against remoteness or perpetuity; and as it has long been the habit of conveyancers to frame powers of sale in general terms, the Courts have had to consider how they are to be limited so as to bring them within the rules; and the Courts have

(1) [1912] 2 Ch. 622, 630. (2) 18 Ch. D. 429, 433.

decided that the powers, although framed in general terms, are limited by the nature of the limitations contained in the settlement or will, so that when, by reason of the expiration or cesser of the limitations contained in the settlement, whether made by will or deed, the absolute interests come into existence, then the power is considered to be at an end: and, inasmuch as no settlement can be valid either by will or deed under which absolute limitations do not come into existence within the prescribed period, that makes all the powers valid. That is the doctrine which is laid down not only in *Lantsbery* v. *Collier* (1) but in a long line of cases." In my opinion the test for the validity of a power is this: Is it, upon the true construction of the instrument which creates the power, capable of being exercised at a point of time when the perpetuity period has run out—that is to say, does the instrument contemplate that the power may be exercised at such a time? That seems to me to be an accurate statement of what was said by Parker J. in *In re De Sommery* (2), where, although he uses the phrase "special power," his language is applicable, in my opinion, to the case of a power of leasing: "A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards is, by reason of the rule against perpetuities, absolutely void; but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule."

In this deed the trust was one to manage coupled with a power to lease, the object of which was to enable the trustees to provide the necessary annual moneys to carry out the beneficial trusts. The trustees may either work the mines themselves at a profit, or they may lease the mines for other people to work, receiving rent and royalties. Under the will, the trusts of which are to be treated as incorporated in the deed of 1894, the surviving husband of any daughter of the testator is entitled to the annual sum in question during

(1) 2 K. & J. 709.
(2) [1912] 2 Ch. 622, 630.

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his life. So long as any such husband survives the trustees can, if they think fit, work the mines themselves, and pay the husband the annuity out of the moneys so provided. But the express terms of the deed of 1894 also contemplate the continuance of the power of leasing throughout the life of such surviving husband. In other words, on the true construction of the deed, the power of leasing is exercisable at any time during the life of the surviving husband, who will not necessarily be a person who was alive at the date of the execution of the deed of 1894. In those circumstances the trustees might, having worked the mines, exercise their leasing powers for the first time at a point of time outside the perpetuity period. It therefore seems to me that the power is one which would be capable of being exercised so as to create a new interest in the land for the first time after the perpetuity period had expired. It was said that at any time after the execution of the deed the trusts could have been put an end to. In my opinion that is not so. The persons entitled to these annual sums could not at any moment require that the corpus necessary to produce the annual sum should be provided. On the true construction of the deed their rights, until the sale, were limited to receiving so much of the income of the mines as was available de anno in annum to produce the annual sums, and they had no right until the sale of the mines to call upon the trustees to set apart any capital sum. Then it is said the three sons together could have insisted on the annuitants giving up their rights in the mine, if the sons chose to provide sufficient capital to produce the annuities in proper securities. I am not clear that there was any such right under the terms of this deed, but, even if there were, it was a right that need not be exercised. From whatever point of view you consider the matter the creation by the trustees under the power for the first time of an interest in land might occur after the perpetuity period had expired, and that is an event expressly in terms within the contemplation of the deed. For these reasons it appears to me that the power of leasing contained in the deed of 1894 is not a valid power.

J. B. B. M.

All the parties to the proceedings except the defendants Hugh Allott, his mother Louisa Allott and his sister Louisa M. Chapman, appealed against the order of Russell J. so far as it declared that the power of leasing given to the trustees by the deed of family arrangement of December 9, 1894, was void. The appeal was heard on June 30 and July 1, 1924.

A. Grant K.C. and *Russell Gilbert* for the appellants repeated the arguments used by them in the Court below and referred to *Lantsbery* v. *Collier* (1); *Boyce* v. *Hanning* (2); *In re Lord Sudeley and Baines & Co.* (3); *Wallis* v. *Freestone* (4); *In re De Sommery* (5); *Nelson* v. *Callow* (6); Davidson's Precedents in Conveyancing, 3rd ed., vol. iii., part i., pp. 570, 572, 573, 577, 578*n*.

Bennett K.C. and *Bryan Farrer* for the respondent Hugh Allott and *Jolly* for the respondents Louisa Allott and Louisa M. Chapman were not called upon to argue.

POLLOCK M.R. This is an appeal from a decision of Russell J. given on February 22 of this year upon a point which he was invited to consider by an originating summons setting out a number of points arising on a deed of family arrangement entered into upon December 9, 1894. The matter arises in this way. I will just recapitulate the facts which are stated further and at length in Russell J.'s judgment. The testator, John Allott, by his will dated July 6, 1882, made certain provisions for his family, which consisted of three sons and four daughters. Among the provisions made by his will the testator provided that in certain events and at certain times after there had been an accumulation made which was for the purpose of providing a sum of 3000*l*. in respect of each of his daughters and the income from which was to be paid to her that sum should be paid to her and that the trustees from and after the death

(1) 2 K. & J. 709.
(2) 2 Cr. & J. 334.
(3) [1894] 1 Ch. 334.
(4) 10 Sim. 225.
(5) [1912] 2 Ch. 622.
(6) (1848) 15 Sim. 353.

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of such daughter should stand possessed of such daughter's share in the accumulated fund in trust to pay the income thereof to the husband, if any, of each such daughter for his life; and later he further provided with regard to certain sums that they should be paid, not by way of income from the accumulated fund, but by way of annuities that were to be paid to the daughters upon trust: "to pay and apply the same sums to the same persons upon and subject to the same trusts and provisions as are hereinbefore declared in respect of the shares of such daughters in the said accumulated fund and the income thereof." The testator died on August 7, 1888, and, again for reasons which I need not expand and which are contained in Russell J.'s judgment, it was determined that there should be a deed of family arrangement. That deed of family arrangement was entered into upon December 9, 1894. Meantime Hugh Allott, the grandson of the testator John Allott, who was the eldest son of John George, the eldest son of the testator, had come of age on May 29, 1894, and Hugh executed on December 5 a disentailing deed which was enrolled on December 8, and Hugh thereupon became tenant in fee. The deed of family arrangement of December 9, 1894, was entered into for the purpose of clearing up a number of matters which had been left in an unsatisfactory position under the will of the testator. In particular I may mention two matters. One was that the unmarried daughters had by the terms of the will received two annuities severally; another that the income from certain mines which had not been disposed of, went to the grandson and was not, as it was understood by the family to be, to belong to the three sons of the testator. However, I need not deal with those matters, because they were dealt with under this deed of family arrangement of December 9, 1894. That deed contained a power which was not in the original will under which the trustees "may from time to time or at any time grant any leases not exceeding 99 years of all or any of such mines beds veins and seams of coal and fireclay and whether opened or unopened and in each case

upon such terms and conditions as to rents royalties and reservations (and as to rent whether by way of sliding scale or otherwise) and as to searching for opening up and developing and winning and working the same mines beds veins and seams of coal fireclay and otherwise with reference thereto and the carrying away thereof as to the trustees or trustee may seem proper." Now the originating summons was taken out before Russell J. to determine a number of questions which arose upon that deed, and among others the question whether or not the power thereby purported to be given to the trustees or trustee for the time being thereof of granting leases not exceeding 99 years of the mines beds veins and seams of coal and fireclay thereby settled was valid and subsisting and capable of being exercised by the plaintiff and the defendant Percy Brian Allott as the present trustees of the said indenture or was void as infringing the rule against perpetuities or otherwise not subsisting and capable of being exercised as aforesaid. Russell J. determined among a number of other points that this power of leasing was void, and it is upon that point alone that the appeal is brought before us, and we have to decide whether his judgment on that point is right or not.

Now Russell J. put his judgment in this way. "There is no limit of time expressed upon the face of the deed during which the power may be exercised." Then he stated that although unlimited in point of time and prima facie a perpetual power, in a number of cases the Courts have construed such a power "as limited in regard to the period of time within which it must be exercised to the duration of the trusts for the execution of which the power is given." Mr. Grant has argued before us that the learned judge's decision is wrong, and he says that if you look at the power so granted as ancillary only to the purpose for which the deed was entered into there is no difficulty in giving validity to it. He has, in an argument which to me personally has been extremely helpful, called our attention to a number of cases; but I do not see that Russell J. has in any way deviated from the

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authorities as they stand. I will not attempt to go through them, but it appears that owing to a decision of Lord Eldon in *Ware* v. *Polhill* (1) it was a matter of doubt whether or not these powers, if unrestricted in point of time, were valid or not, and the practice of conveyancers thereupon arose of putting a time limit for a power of sale and the like, although the power of leasing was usually treated as one still subject to and curtailed by the limits of the deed within which it was contained and for the purpose of which it was to be exercised. Then, afterwards, the true view or the result of Lord Eldon's decision was explained in the passages which have been quoted to us from Sugden on Powers, and Davidson's Precedents in Conveyancing, and it is to be found in *Lantsbery* v. *Collier* (2), where the headnote states: "The Court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee simple be limited after estates tail or after estates for life, will hold the power to be a valid and subsisting power until the estates tail (if any) are barred, or the fee simple vested in possession:—in either of which events the purpose of the settlement is spent, and the power ceases." So, says Mr. Grant, in the present case this power of leasing is entirely ancillary to the purposes of the settlement; the power is not void ab initio, and if the limitations are valid and the power is for the purpose of carrying into effect the limitations, then the power itself is valid. But I think, if one reads the cases aright, the true position is this, that the ancillary power is to be deemed to be valid if it is for the purpose of carrying out the limitations which are valid, provided that those limitations will, in their ordinary course, or if certain events happen, be put an end to or come to an end within the limitations of the rule against perpetuities. If that be the right principle to apply, and I have endeavoured to express it in accordance with the terms which are laid down in the case to which I have referred, in order to see whether this power of leasing is good or not, one has to see, as Russell J. held, whether or not, assuming the power to be ancillary, in the

(1) (1805) 11 Ves. 257. (2) 2 K. & J. 709.

events or event or particular circumstances of this deed the actual limitations come, or would come, to an end within the period allowed by the rule against perpetuities. In this particular deed, the provision which I have read provides that the interests of the daughters should enure as life interests to their husbands, and their husbands may be or might not be in being at the time when the deed of 1894 was executed. Therefore for the purpose of the life interest to the husband it might be necessary to keep alive that power beyond the period allowed by the rule against perpetuities of lives in being and twenty-one years thereafter, and therefore, as you find that there are events in which it would be impossible to bring to an end that power within the limitations laid down by the rule against perpetuities, the power itself, ancillary though it be, is one which is invalid. That is the decision to which Russell J. has come, and which I think is right. The appeal therefore must be dismissed.

WARRINGTON L.J. I am of the same opinion. The question is whether a certain power of leasing contained in the deed of December, 1894, is or is not valid. It is said not to be valid because it is a power which might be exercised at a period exceeding the limit laid down by the rule against perpetuities. Now the deed of 1894 is a deed dealing with the rights of the beneficiaries in certain mines and minerals comprised in and devised by the will of John Allott, who died in 1888. Under the will there were in 1894 payable under the trusts thereof two perpetual annuities; one of them was settled upon trust for one of his married daughters during her life, and after her death made payable to any husband whom she might marry, and after the death of such husband payable to or held in trust for her children as she should appoint, and in default of appointment upon trust for children attaining twenty-one. I need not give the details of those trusts; they are quite immaterial. The point is that each of those annuities might become payable during the whole of the life of a person who was not in existence at the death of the testator, and, looking at it from the point of view of the

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deed of 1894, who was not in existence at the date of the execution of that deed.

Now the deed, as I say, dealt with the beneficial interests of the parties to it and left unaffected the legal estate which was vested in the trustees of John Allott's will. The duties of the trustees of this deed were to manage these mines and minerals, to seek for and get, if they could, the mines and minerals, but with power to lease the mines and minerals for any term not exceeding 99 years. It is that power and authority which is in question. The trusts imposed upon the trustees of the deed were, first, to pay the annuities payable under the will of John Allott to his daughters, including the annuities payable, as I have mentioned, to each unmarried daughter, and after her death to any husband whom she might marry. That was a direction to pay the annuities in those ways and to those persons. It is obvious that if the trustees carried out those trusts they might have extended beyond the period allowed by the rule against perpetuities, because they might have required the trustees to pay each of these annuities for a period exceeding lives in being at the date of the execution of the deed and twenty-one years afterwards. The power of leasing is co-extensive with and given to the trustees for the purpose of enabling them to execute the trusts of that deed, and as that is so, then that power is one which might be exercised at some time exceeding the period allowed by the rule against perpetuities. That is at a time beyond the lives of persons in existence at the date of the deed and twenty-one years afterwards. The learned judge has held that in these circumstances the power was void in its inception, and I agree with him. It is perfectly true that if a power of this sort which is inserted in a settlement is capable of being put an end to or of itself comes to an end with the determination of the trusts within a period not affected by the rule against perpetuities, then the power is good although there are no express words limiting its execution to such period. But that doctrine in my opinion is inapplicable to the present case, because in the present case the trusts themselves continue or may continue,

which of course is sufficient for the purpose, beyond the period allowed by the rule against perpetuities. The continuance of the power is, I agree, co-extensive with the trusts of the deed, but then unfortunately those trusts exceed the legal limit. Therefore, as the power could be exercised within a period exceeding the legal limit, in my opinion it is invalid.

I agree with the judgment of Russell J.

SARGANT L.J. I am of the same opinion. I wish the Court could have taken a different view, because the decision will obviously add to the expense of granting the necessary lease, but one must not avoid this difficulty by making bad law. Here I desire to deal with the matter on the lines on which it has been dealt with by the learned judge. The learned judge proposes a test for himself, and then he considers how that test is satisfied in the particular circumstances of this case. He says: "Is it upon the true construction of the instrument which creates the power capable of being exercised at a point of time when the perpetuity period has run out?" In my judgment that is the true test to apply. The learned judge fortifies his view by citing a passage from a judgment of Parker J. in *In re De Sommery*. (1) It is true that in many cases a power of this kind which is not limited in point of time by any express words is held to be good, because in the settlement or the document itself there are indications which show that it was not intended to be exercised except within the limits which are good in law. (I except, of course, the special case of a power which can be defeated by a deed under the Fines and Recoveries Act.) Here if the general terms in which the power is expressed could be limited in any such way within the necessary confines, then this power would be good. Then the learned judge, having stated the test, proceeds to see whether the document in question does so confine the power by virtue of its general provisions, and he says: "To put the case at its lowest the following seems to be the position: that the

(1) [1912] 2 Ch. 622, 630.

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express term of the deed of 1894 contemplates the continuance of the power of leasing throughout the life of such surviving husband "—that is, a husband who might marry one of the daughters of the testator and who was not in existence at the date of the deed of 1894. That being so, not only is there not any implied limitation of the period of the exercise of the power within the proper limits, but there is a definite indication of intention that the power may be exercised at a period outside those limits. Therefore in my opinion the power was bad from the beginning.

Mr. Grant has pressed this point upon us. He says that here the trusts for the surviving husband, although he was not born at the date of the deed, are good, his life interest is a perfectly good one, and therefore it is absurd to say that a power of leasing which can be exercised during the continuance of a trust which is a good trust would be bad. I think the answer to that is this. The quantum of the life estate of the husband would be determined once and for all within the limit allowed—namely, immediately on the death of the wife. On the other hand the estate which would be created under the exercise of a power of leasing would be something which need not be determined in quantum within that limit, but might be so determined at any time during the additional period covered by the remainder of the life of the surviving husband. It seems to me that the power is bad because it might create an estate the quantum of which could be determined outside the limits of perpetuity, while the estate of the husband is good because its quantum is determined within those limits.

I agree with the very careful reasoning of the learned judge, and I accept every word that the learned judge has used.

Appeal dismissed.

Solicitors : *Collyer-Bristow & Co. ; Frere, Cholmeley & Co. ; Pilley & Mitchell, for Staniland & Grocock, Boston ; Collyer-Bristow & Co., for Wilson, Bell, Ingoldby & Son, Louth.*

W. I. C.

In re COHEN.

Ex parte TRUSTEE.

[1164 of 1923.]

C. A.
1924
LAWRENCE J.
May 12.

C. A.
June 27;
July 11.

Bankruptcy—Fraudulent Preference—"With a view of giving a preference"—Voluntary Payment—Absence of Motive—Practice—Evidence—Right to read Admissions in Affidavit filed but not read by Opponent—Bankruptcy Act, 1914 (4 & 5 *Geo.* 7, *c.* 59), *s.* 44, *sub-s.* 1—*Bankruptcy Rules*, 1915, *rr.* 29, 33, 387.

On June 29, 1923, the respondents, having received from the bankrupt an order for goods, on the same day delivered them to the bankrupt together with an invoice bearing the same date, which subsequently at the bankrupt's request was post-dated to July 10. On July 20 the bankrupt, although fully realizing his insolvency, sent to the respondents and to 107 other creditors cheques which were all post-dated to July 31 in settlement of their several accounts. On July 31 the bankrupt gave notice to his creditors that he was about to suspend payment. Not one of those post-dated cheques was paid on presentation: but on July 30, the day preceding the act of bankruptcy, the bankrupt paid in cash to the respondents, who had no knowledge of the bankrupt's financial difficulties, the amount he owed them less discount. On August 30, 1923, on a creditor's petition presented on August 3, an order of adjudication was made against the bankrupt.

Upon a motion by the trustee in the bankruptcy for a declaration that the payment to the respondents was a fraudulent preference under s. 44, sub-s. 1, of the Bankruptcy Act, 1914, the respondents filed an affidavit in opposition, which contained statements which revealed a voluntary offer on July 30 on the part of the bankrupt to the respondents to pay the amount due to them in cash; and the question was then raised whether the trustee had the right, which he claimed, to read those statements as admissions by the respondents of the absence of pressure and of the entirely voluntary nature of the payment:—

Held, by Lawrence J., that the practice of the Chancery Division was applicable to bankruptcy proceedings, and that the trustee was entitled to rely on the statements in question as admissions by the respondents, in support of his case, whether the respondents elected to use the affidavit or not.

Held, further, but chiefly on those admissions, that the payment of the debt due to the respondents having been made voluntarily by the bankrupt on the eve of his bankruptcy and with knowledge of his insolvency, in the absence of proof of some other dominant motive for the payment, a sufficient case was established by the trustee that the payment was made with a view to prefer creditors, and must, therefore, be deemed a fraudulent preference within the meaning of s. 44 of the Bankruptcy Act, 1914, and that the respondents must repay the money to the trustee. On appeal:—

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Held, reversing the decision of Lawrence J. on the preliminary point of practice, that the practice in the Bankruptcy Court, differing in this respect from the practice in the Chancery Division, was that where an affidavit had been filed by a respondent to an application, the applicant was only entitled to refer to the contents thereof after the respondent on opening his case had elected to read it.

Ex parte Child (1882) 20 Ch. D. 126 followed.

Held, further (Pollock M.R. dissenting), that where a bankrupt in imminent expectation of bankruptcy voluntarily pays a particular creditor with the result of giving him a preference in fact, and the reason for such payment is unexplained, a prima facie case of fraudulent preference is established.

Held, therefore, that the trustee having proved a prima facie case of fraudulent preference and the creditors having withdrawn their affidavit in opposition and there being therefore no evidence to the contrary, the trustee was entitled to succeed on his application.

Decision of Lawrence J. affirmed.

MOTION.

On June 29, 1923, Messrs. W. R. Snow & Co., the respondents, who carried on business as silk merchants in the City of London, received an order from Morris Cohen (the bankrupt), a general merchant and shipper, for certain velvet goods, and on the same day by arrangement with the bankrupt delivered the goods together with an invoice also dated June 29. The amount of the invoice was 460*l.* 16*s.* 8*d.*, and the terms were $3\frac{3}{4}$ per cent. discount for cash, if paid within seven or ten days, making the total sum if paid within those dates, 449*l.* 6*s.* 3*d.* At the request and for the accommodation of the bankrupt, who alleged want of space to store the goods, the respondents post-dated the invoice to July 10, 1923, which gave the bankrupt further time for payment, that is to say, until July 17 or 20. On July 20, the bankrupt, who at that date was heavily indebted and, as he himself was well aware, hopelessly insolvent, of his own accord sent to 108 creditors of his, including amongst them the respondents, to whom he owed 449*l.* 6*s.* 3*d.* on account of the goods sold and delivered to him, post-dated cheques in payment of their respective debts. All the cheques were made payable on July 31, 1923, and all of them, with the exception of the cheque that was sent to the respondents, were ultimately dishonoured. As regards the debt which the bankrupt owed

the respondents: On July 30, 1923, the bankrupt paid the amount thereof—namely, 449*l.* 6*s.* 3*d.*—in cash to the respondents in exchange for the cheque which he had previously sent to them. At the time of payment the respondents were completely ignorant of the financial difficulties of the bankrupt, and were innocent of any wilful infringement of the bankruptcy laws.

On August 3, 1923, a creditor's petition was presented, which was founded on an act of bankruptcy committed by the bankrupt on July 31, 1923, when he gave notice to his creditors that he was then about to suspend payment of his debts. On August 24 a receiving order was made, and on August 30, 1923, he was adjudicated a bankrupt.

This was a motion by the trustee in the bankruptcy that the payment of 449*l.* 6*s.* 3*d.*, made on July 30, 1923, by the bankrupt to the respondents might be declared to be a fraudulent preference and void as against the trustee by virtue of s. 44, sub-s. 1, of the Bankruptcy Act, 1914, and that the respondents might be ordered to pay that sum to the trustee.

The respondents had filed an affidavit in opposition to the motion, which contained statements relating to the circumstances attending the payment by the bankrupt of his debt to the respondents; and a preliminary question arose whether the trustee had the right, which he claimed, to read those statements as being admissions by the respondents that the payment was made by the bankrupt voluntarily and not under the influence of any pressure on the part of the respondents.

The circumstances referred to in the affidavit filed by the respondents and relied upon by the trustee as admissions that the payment was with a view to prefer a creditor were shortly as follows: On July 20, 1923, the time for payment named in the invoice having expired, a representative of the respondents named Preston called on the bankrupt and asked for payment, and the bankrupt or some one in his employment promised that a cheque would be dispatched forthwith. A cheque was sent to the respondents in due

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course, but it was post-dated July 31, which effected a further postponement of eleven days. About July 26 or 27 Mr. Preston again called on the bankrupt and reminded him that the cheque would become due shortly. The bankrupt showed some resentment at Preston's calling, and asked whether he had any reason to doubt that the cheque would be duly met. Thereupon Mr. Preston assured the bankrupt that he had no such doubt and that he called merely for the purpose of seeing that the matter was in order. However, on July 30 the bankrupt telephoned to the respondents: "As you are so anxious about my cheque, if you will come round I will pay you cash." Preston replied that he would refer to the counting house manager. Later on the same day the counting house manager, who had no suspicion as to the bankrupt's financial condition, telephoned to the bankrupt and suggested that he should pay the cash into the bank to meet the cheque. The bankrupt showed that he was annoyed and the counting house manager said that he would call for the money. Later in the same day he, in company with Mr. Preston, did call upon the bankrupt, who paid him the sum of 449*l.* 6*s.* 3*d.* in cash in exchange for the cheque.

The motion was heard before Lawrence J. on May 12, 1924.

C. F. Entwistle for the trustee. The trustee is entitled to read the statements in the affidavit filed by the respondents, as they contain admissions by the respondents of absence of pressure and of the voluntary nature of the payment by the bankrupt of the debt which he owed the respondents. Those statements as to the circumstances attending the payment, and the absence of proof of any motive for the payment except that of preferring the respondents, clearly show that the payment in question was made with a view to prefer the respondents within the meaning of s. 44 of the Bankruptcy Act, 1914, and must therefore be deemed a fraudulent preference. It is submitted that the defence revealed by the respondents' affidavit is misconceived in law. The whole purport of their affidavit is to establish

absence of mala fides on the part of the respondents. It is immaterial to establish that, as the only question involved is the intention of the bankrupt, and not the good faith or otherwise of the creditor. Sect. 44, sub-s. 2, gives protection to a person making title in good faith and for valuable consideration through or under a creditor; but this protection does not extend to the creditor himself.

Tindale Davis for the respondents. First, there is no evidence filed by the trustee which shows fraudulent preference. The trustee is not entitled to read the statements contained in the affidavit filed by the respondents. The affidavit was filed in accordance with r. 33 of the Bankruptcy Rules, 1915, and copies were supplied to the trustee in order to comply with r. 29. The practice was long ago settled by *Ex parte Child.* (1) The trustee is not entitled to read the statements which he claims to read, unless and until the respondents elect to read the affidavit containing those statements. If the trustee is allowed to read those statements, which he relies upon as admissions, then the whole of the affidavit must be read to show an entire absence of mala fides on the part of the respondents. To prefer the respondents when he made the payment was not the dominant motive of the bankrupt: *Ex parte Hill.* (2) *In re Quartz Hill, &c., Co.* (3) decided that where a party has filed an affidavit to be used in a matter pending before the Court, he cannot be exempt from cross-examination on it by withdrawing that affidavit: but that was a decision affecting Chancery procedure and is not applicable in bankruptcy. The Supreme Court Rules do not apply to bankruptcy matters: Bankruptcy Rules, 1915, r. 387. The evidence, even if admitted, does not show that the dominant motive was to prefer; the real motive of the bankrupt was to satisfy his resentment.

LAWRENCE J. This case raises a question as to whether a payment made to W. R. Snow & Co., the respondents, was a

(1) 20 Ch. D. 126. (2) (1883) 23 Ch. D. 695.
(3) (1882) 21 Ch. D. 642.

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fraudulent preference within s. 44, sub-s. 1, of the Bankruptcy Act, 1914. I desire to say at the outset that not a word can be said against the respondents in this case. It is not suggested that they knew of the predicament in which the bankrupt was when they received the payment, and they have not acted otherwise than as honest and honourable tradesmen. [His Lordship then stated the facts and proceeded as follows :] Now, what was the position of the bankrupt on July 30, when he paid the respondents in cash the amount he owed them ? He was hopelessly insolvent. He had, as a matter of fact, sent out 108 cheques similarly post-dated to July 31, and had no money to meet these cheques : moreover, he knew that that was the case when he paid the money to the respondents on the 30th. On July 31, the date on which the cheques fell due, the bankrupt gave notice of suspension of payment ; and, founded on that act of bankruptcy, a creditor's petition was presented upon which a receiving order was made. Therefore, to start with, there is the fact that the bankrupt, at the time when he made the payment to the respondents, was unable to pay his debts as they became due from his own moneys, and the only point—and Mr. Tindale Davis has put it clearly and forcibly—is, that there is no evidence to show that the payment was made by the bankrupt with a view of giving the respondents a preference over the other creditors. In the first place, Mr. Tindale Davis contended that the trustee's affidavit contained no evidence which could justify the contention that the payment was made with a view to prefer, and challenged the right, which Mr. Entwistle on behalf of the trustee claimed, to refer to the affidavit which the respondents had filed, even though Mr. Entwistle confined his claim to reading statements which he relied on as admissions by the respondents. In my opinion, if the respondent to a motion, either in the Chancery Division or in the Court of Bankruptcy, chooses to file an affidavit containing admissions, his opponent is entitled to read such admissions in addition to the evidence contained in his own affidavit in support of his case. It does not follow that the respondent is obliged to put the affidavit in evidence, and it certainly does

not follow that the applicant is entitled to cross-examine the deponent upon the affidavit, unless it is put in by the respondent. Any statements contained in such an affidavit, however, can, in my opinion, be read against the deponent just as any other written admissions could be so read, and none the less because they are made on oath in an affidavit filed in the matter. I, therefore, allowed Mr. Entwistle to read such parts of the respondents' affidavit as he relied upon by way of admission, and, therefore, Mr. Tindale Davis elected to read the whole affidavit. I think it is quite clear he so elected, solely because I had allowed the admissions to be read against him. The respondents in their affidavit frankly state the whole of the facts so far as they knew them. Having regard to these facts, and chiefly to the admissions which I allowed the trustee to read, I have come to the conclusion that the payment in question was made with a view to prefer, a conclusion which has not been displaced by anything Mr. Tindale Davis has so ably argued before me. The ground upon which I hold that a view to prefer has been shown is the entirely voluntary nature of this payment on the part of the bankrupt. The post-dated cheque which he had given had been accepted by the respondents, and they did not anticipate or ask for payment before the date which it bore. Then there came the call on the 26th or 27th (which caused some annoyance), and on the 30th, after an interval of three days, there was the interview, which ended with the assurance that the respondents did not wish to throw any discredit on the bankrupt. However, on the 30th the bankrupt rang up the respondents and voluntarily offered to pay. Therefore, the payment was made in anticipation of a liability which would have to be met on the following day and was a payment which was not pressed for before that date. It was an entirely voluntary payment singled out from 108 similar transactions, in all of which cheques maturing on July 31 had been given. Of the 108 cheques so given, 107 were presented and dishonoured. The only one not presented was the respondents' cheque, which had been paid in anticipation. I asked Mr. Tindale Davis to suggest any motive beyond that of a desire

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to prefer the respondents, and the only one he could suggest was that it was done because the bankrupt was annoyed by Mr. Preston having called on July 27. I think the evidence falls far short of proving that that was the motive for the payment. The respondents had not threatened to sue the bankrupt, who voluntarily rung up the respondents and stated: "As you are so anxious about my cheque, if you will come round, I will pay you in cash." I cannot conceive any motive for the payment, except that he desired for some reason or other to prefer the respondents. He could not derive any advantage by making the payment. It would not have enabled him to keep his business going nor did it benefit him in any way. It is true that the respondents were comparative strangers to him and that he had had only two previous transactions with them, but I am unable to see that this payment was made with any other view than the view to prefer the respondents to his other creditors: and, that being so, the respondents, although entirely innocent of consciously having done anything against the bankruptcy law, are legally liable to repay the money to the trustee in order that the other creditors may share in that money which was paid away on the eve of the bankruptcy.

For these reasons I hold that the payment was a fraudulent preference, and that Messrs. Snow & Co. must repay the money to the trustee.

The trustee having succeeded in this motion, Messrs. Snow & Co. must pay the costs.

H. C. H.

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The respondents appealed. The appeal was heard on June 27, 1924.

Tindale Davis for the appellants. The learned judge was wrong in allowing the respondent, the trustee, to refer to the appellants' affidavit in opening his motion.

An applicant must support his application by his own affidavit: Bankruptcy Rules, 1915, r. 26. Rule 29, which affects the respondent, provides that "where a respondent intends to use affidavits in opposition to a motion he shall

deliver copies of such affidavits to the applicant not less than two days before the day appointed for the hearing." There is no obligation on a respondent to file an affidavit, although he usually does so. Beyond this rule there is no rule dealing with the respondent's affidavit.

[WARRINGTON L.J. referred to r. 33.]

The respondent's affidavit cannot be referred to until the respondent comes to open his case. That has been the practice since 1882: *Ex parte Child.* (1) The respondent has a right to withdraw his affidavit at any time before his turn comes to open his case and to submit that no case has been made out against him by the applicant.

[WARRINGTON L.J. The practice is different in the Chancery Division.]

[He also referred to *In re Attree* (2) and *In re Bottomley.* (3)]

C. F. Entwistle for the respondent. The only case cited in support of the respondents' contention is *Ex parte Child.* (1) That case only decided that a respondent cannot be cross-examined on his affidavit until he puts it in evidence.

[POLLOCK M.R. That is on the ground that the Court could not until then be certain whether the affidavit was before it or not.]

It is clear from that case that the trustee here might have called the respondents as his witnesses.

There are no merits in the present point. It is a mere technicality, and is put forward in order to prevent the facts being brought to the knowledge of the Court.

[WARRINGTON L.J. It is not a technicality. A person who asserts a thing should prove it. You could have subpœnaed the deponent to the affidavit.]

The only point in *Ex parte Child* (1) was whether a deponent before he had decided to use his affidavit could be exposed to all the damaging effects of a cross-examination on it. No question of cross-examination was here involved, because the trustee gave no notice to cross-examine. Being a technicality the Court ought not to extend the practice. The practice

(1) 20 Ch. D. 126. (2) [1907] 2 K. B. 868, 876.
(3) (1915) 84 L. J. (K. B.) 1020.

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in bankruptcy in this respect is different from that which obtains in the Chancery Division: *In re Quartz Hill, &c., Co.* (1)

[SARGANT L.J. That is admitted.]

There is nothing in the bankruptcy rules to support the view that where an affidavit is on the file it cannot be referred to by the applicant until the deponent has decided to use it.

In re Attree (2) has no application to the present case.

POLLOCK M.R. This appeal raises a question of some importance as to the practice in the Bankruptcy Court, but in that Court only. The point taken by Mr. Tindale Davis on behalf of the appellants is that the learned judge was wrong in looking at the affidavit filed but not read by the appellants, the respondents to the motion. The trustee in bankruptcy claimed that a certain payment made by the bankrupt to the respondents constituted a fraudulent preference within the meaning of s. 44 of the Bankruptcy Act, 1914, and that the money ought to be repaid to him, and filed an affidavit in support of his case. The respondents also filed an affidavit in opposition to the motion, sworn by a Mr. Preston, an employee in the respondents' firm, which Mr. Entwistle on behalf of the trustee claimed a right to read as containing certain admissions by the respondents. He relied on those admissions as affording additional evidence in proof of the payment in question constituting a fraudulent preference. Mr. Tindale Davis on behalf of the respondents objected to the trustee reading those statements as admissions, on the ground that, although the affidavit had been filed, it was not in evidence before the Court, as the respondents had not then decided whether or not they would use it. The learned judge, however, applying the practice of the Chancery Division, allowed the affidavit to be used by the trustee for the purpose of establishing his case.

The preliminary point to be decided is whether the learned judge in coming to that conclusion was right. The point is one of practice, but I do not think it is a mere technicality.

(1) 21 Ch. D. 642. (2) [1907] 2 K. B. 868.

It involves the question of the onus of proof. The trustee claimed to rely, for the purpose of proving his case, upon certain statements contained in the respondents' affidavit. But a trustee must succeed, if he can, on the evidence he himself puts before the Court. Can he make use of an affidavit which has been filed by the respondents, but has not been put in evidence by them ?

The practice in bankruptcy was settled by the Court of Appeal in 1882 in *Ex parte Child.* (1) In that case a question was raised whether the applicant had the right, which he claimed, to cross-examine the respondent on the affidavit which he had filed, but which he had not determined whether or not he would read. The respondent objected to the affidavit being read on the ground that, although it was before the Court in the sense that it had been filed, it was not in evidence until the respondent had elected to use it as such. The Court of Appeal took a definite step to ascertain what the practice in bankruptcy was by consulting the registrars of the Court of Bankruptcy, and a certificate as to the practice was given by Mr. Registrar Murray, which is set out at pp. 128 and 129 of the report of the case. I will only refer to the following passage in it, which appears on p. 128 : " If, however, on the opening, the respondent alleges that there is no case, and objects to his affidavits being read until that question has been disposed of, such objection is always allowed ; and it frequently happens that, by reason of the applicant's evidence failing to establish his case, the respondent is not called upon to read his affidavits, or to enter at all on his defence. The result would be analogous to a nonsuit. I have never known a case in which a party has been held compellable to read an affidavit (which he desired to withdraw) merely because it had been filed ; but this would not preclude the opposite party from being allowed to examine the deponent as his own witness." That certificate was accepted by the Court of Appeal as containing a correct statement of the practice in bankruptcy. It is clear therefore that a respondent may take the objection that the applicant has not established his

(1) 20 Ch. D. 126, 128.

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claim on the motion, and, if that objection is allowed, that the respondent is not compelled to allow his evidence to be read. Jessel M.R. in the course of his judgment said (1): "According to the certificate of the registrars it was the undoubted right of the respondent (the present appellant) to say that he would not state whether he meant to read his affidavit or not until his turn came to open his case, and he was entitled to object to be cross-examined on the affidavit until he had determined whether he meant to read it or not." Acting on that view the Court of Appeal accordingly held that no order could be made on the application, as the applicant had failed to make out his case.

It seems therefore quite clear from that case that the mere filing of an affidavit is not sufficient to make it evidence before the Court, because the respondent is entitled to exercise his own volition whether or not he will make use of it. That case was decided in 1882, and since that date the rules in bankruptcy have from time to time been amended. The present rules relating to filing affidavits are rr. 33 and 57 of the Bankruptcy Rules, 1915, and by r. 29, which was made in 1915, long after the decision in *Ex parte Child* (2), it is provided that, "Where a respondent intends to use affidavits in opposition to a motion he shall deliver copies of such affidavits to the applicant not less than two days before the day appointed for the hearing." The effect of that rule is that in order to put himself in a position to be able to determine whether he will use his affidavits or not, the respondent must give his opponent copies thereof beforehand. The word "intends" in the rule clearly connotes a future decision. It is at the time when the respondent hears the case made against him that he is to decide whether or not he will use the affidavits he has filed. I can find nothing in the rules which in any way negatives the rule laid down in *Ex parte Child*. (2) The respondent need not elect whether he will put his affidavit in evidence until he comes to open his own case.

For these reasons I think the learned judge was wrong in allowing the trustee to pick out and use statements in the

(1) 20 Ch. D. 129. (2) 20 Ch. D. 126, 128.

affidavit filed by the respondents, because, in my opinion, that affidavit was not in evidence before the Court. On this preliminary point, therefore, the learned judge was wrong in allowing those statements to be treated by the trustee as admissions in order to establish his case against the respondents. In this respect the practice in bankruptcy differs from that in the Chancery Division. On this preliminary objection, therefore, Mr. Tindale Davis succeeds.

WARRINGTON L.J. I am of the same opinion. In this case the trustee in bankruptcy has applied by motion for a declaration that a payment made by the bankrupt constituted a fraudulent preference. In support of his application he filed an affidavit. The respondents also filed an affidavit, but they did not read it. They took the objection that on the affidavit of the trustee taken alone he was not entitled to judgment. Lawrence J. however held that he (the learned judge) was entitled to look at certain statements in the respondents' affidavit and to treat and rely on them as admissions. In my opinion, the practice in bankruptcy on this point is quite clear and differs entirely from that in the Chancery Division. The mere filing of an affidavit is not in itself sufficient to enable the opposing party to refer to and use parts of it, if the affidavit has not been read by the party filing it. That was clearly decided in *Ex parte Child* (1), a case in which the Court of Appeal approved of the certificate of all the registrars of the Bankruptcy Court. I need not read the whole of it. The material part is: [His Lordship read the passage from the certificate, and also that from the judgment of Jessel M.R., read by the Master of the Rolls, and continued:] That certificate was adopted by Jessel M.R., and his judgment was concurred in by Brett and Holker L.JJ. It is perfectly true that the concrete question in *Ex parte Child* (1) was not quite the same as that in this case, but was whether the trustee was entitled to cross-examine the respondent on his affidavit, which he had not read, but that was only an example of the principle which is that a

(1) 20 Ch. D. 126.

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respondent may up to the last moment withhold his decision whether or not he will use the affidavit he has filed. The learned judge has distinguished *Ex parte Child* (1), and has held that he is entitled to look at the affidavit to see whether it contains admissions. But, in my opinion, there is no distinction between taking facts out of an affidavit to use as admissions and reading the whole of it. If the affidavit is looked at at all the whole of it must be looked at. Until the affidavit is used by the deponent it forms no part of the materials before the Court. Statements in an affidavit are not statements at all until the deponent has decided to use the affidavit. But if the applicant, as in the present case, is furnished with a copy of the affidavit, and finds that it contains facts which are useful to his case, he can always call the deponent as his witness, and consequently no injustice is done. It is quite true, also, that counsel for the respondents was compelled to read the affidavit, but he only did so after passages had been taken out of it and used as admissions against the respondents by the judge.

I am clearly of opinion that the learned judge was not entitled to refer to the appellants' affidavit.

SARGANT L.J. I am of the same opinion. It seems to me that this case is entirely covered by *Ex parte Child* (1)—a very important decision. Under the rules in bankruptcy the respondent files his affidavits and gives copies thereof to the applicant for the purpose of putting the respondent in a position to use these affidavits if he finds it necessary so to do, and also for the purpose of informing the applicant of the case which he may have to meet. The respondent does not by so doing make the affidavits evidence in all events. Nor does it make any difference that an affidavit is one sworn by the respondent himself. Such an affidavit cannot, in my judgment, be used by the applicant as an admission by the respondent. For it is filed and supplied to the applicant only by virtue of the rules for a particular purpose, and provisionally only.

(1) 20 Ch. D. 126.

The creditors' affidavit was thereupon withdrawn, and the argument proceeded on the basis that the trustee's affidavit was the only evidence before the Court.

Tindale Davis for the appellants. It is submitted that the affidavit of the trustee shows no evidence of fraudulent preference. The onus is on the trustee to establish affirmatively that the "view" of the debtor was to prefer the creditor: *In re Laurie* (1); *In re Hoyle.* (2) Here the appellants were perfect strangers to the debtor. *In re Ramsay* (3) is a decision which appears to be contrary to the Act of Parliament itself. It is immaterial whether the creditor is in fact preferred; the question is whether it was the intention of the debtor to prefer him. There must be an intention to prefer: *Sharp* v. *Jackson.* (4) "Preference" connotes a voluntary act. The Court has to consider (1.) whether there was a fraudulent preference and (2.) whether it was the intention of the debtor to give that preference. In *Ex parte Hill* (5) Bowen L.J. considered the three possible meanings of the words "with a view of."

It is submitted that the trustee has not here discharged the onus on him of showing that the payment to the appellants by the debtor was a fraudulent preference.

C. F. Entwistle for the respondent. The affidavit of the trustee shows (1.) insolvency of the debtor, (2.) preference of the appellants over 107 other creditors, and (3.) that the payment was voluntary and made without any pressure by the appellants. In order to establish a fraudulent preference under s. 44 of the Bankruptcy Act, 1924, it is not necessary to prove actual fraud. The conditions of such preference are (1.) insolvency and (2.) payment made with a view to give the creditor a preference over other creditors. There can only be one way of proving a preference, and that is by showing that there was a preference in fact and that it was made voluntarily. If a payment is made by a man in insolvent

(1) (1898) 5 Manson, 48; 67 L. J. (Q. B.) 431.
(2) (1924) B. & C. R. 22, 29.
(3) [1913] 2 K. B. 80.
(4) [1899] A. C. 419, 421.
(5) 23 Ch. D. 695, 704.

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circumstances voluntarily that is a fraudulent preference within the meaning of the section. Here the trustee discharges the onus on him by showing the preference and that it was made voluntarily: Williams on Bankruptcy, 12th ed., p. 296.

[*Tindale Davis* referred to *Ex parte Griffith.* (1)]

Mere proof of insolvency is not enough. But where insolvency is shown and also that the payment was made voluntarily the onus on the trustee is shifted. In *Ex parte Topham* (2) it was held that the payment in that case was not a fraudulent preference, because there was pressure.

[WARRINGTON L.J. If there is pressure the payment is not voluntary.]

Absence of pressure is proof of an intention to prefer. A debtor cannot by any act of his own prefer one creditor to another. In *Ex parte Hall* (3) it was held that a payment was a fraudulent preference notwithstanding pressure.

[POLLOCK M.R. I think that case only decides what was the quantum of pressure.]

Buckley's Case (4) was the case of a preference which arose from a desire on the part of the bankrupt to fulfil a moral obligation, and was held to be fraudulent.

It is submitted that what on the natural construction of s. 44 the trustee has to prove is that the payment was made with a view to prefer and not that it was a fraud. Here the natural inference is that the payment was made with a view to prefer the appellants. The question of the bona fides of the appellants is irrelevant.

[He also referred to *In re Ramsay.* (5)]

Tindale Davis in reply referred to *In re Bell.* (6)

Cur. adv. vult.

July 11. The following written judgments were delivered:

POLLOCK M.R. This is an appeal from an order made by Lawrence J. on May 12, 1924, whereby it was declared that a

(1) (1883) 23 Ch. D. 69, 72.
(2) (1873) L. R. 8 Ch. 614.
(3) (1882) 19 Ch. D. 580.
(4) [1899] 2 Ch. 725.
(5) [1913] 2 K. B. 80.
(6) (1892) 10 Morrell, 15.

payment made on July 30, 1923, by the bankrupt to the creditors who were respondents below, but whom I will hereafter call " the creditors," of the sum of 449*l.* 6*s.* 3*d.* is a fraudulent preference within the meaning of s. 44, sub-s. 1, of the Bankruptcy Act, 1914, and it was ordered that the creditors pay this sum to the applicant, the trustee in Cohen's bankruptcy. Two points were taken by Mr. Tindale Davis, who appeared on the appeal for the creditors. The first was that the learned judge had allowed an affidavit filed by the creditors to be referred to by the applicant for the evidence said to be contained in it before they had elected whether they would use it or not, contrary to the practice in the Bankruptcy Court, as laid down by the Court of Appeal in *Ex parte Child.* (1) We have already decided this point in the creditors' favour.

The second point was that upon the materials put before the Court by the applicant in his affidavit, there was not evidence sufficient to discharge the onus which it is contended lies upon the trustee, and to establish that the payment in question was made " with a view of giving the creditors a preference over other creditors," and thus that the terms of the section had not been complied with.

It was admitted (1.) that the 449*l.* 6*s.* 3*d.* had in fact been paid by the debtor to the creditors. (2.) That at the time when the debtor made the payment he was unable to pay his debts as they became due from his own money. (3.) That the payment was made within three months of the accrual of the trustee's title; for the petition was presented on August 3, 1923, only four days after the payment was made. The issue remains on the question—was the payment made with a view to give the creditors a preference over the other creditors ?

To complete the facts presented by the applicant, the trustee in Cohen's bankruptcy, it appears that the latter purchased goods from the creditors, and that they had been delivered to the bankrupt before June 30, their value as entered in bankrupt's ledger being 460*l.* 16*s.* 8*d.*, but the invoice was made out as at the date of July 10. The debtor

(1) 20 Ch. D. 126.

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did not pay on July 10, but on July 20 he sent the creditors a cheque post-dated to July 31. On July 30 he called upon the creditors and took up his cheque by paying the sum 449*l.* 6*s.* 3*d.* in cash, and receiving a discount of 11*l.* 10*s.* 5*d.* On July 31 the act of bankruptcy was committed—namely, giving notice that the debtor had suspended payment.

The learned judge found bona fides and innocence on the part of the creditors; but he held that a prima facie case of fraudulent preference had been made out, as he says "chiefly by the admissions" that he allowed the trustee to rely upon, coming from the creditors' affidavit, which admissions so termed we have held inadmissible.

In these circumstances Mr. Tindale Davis puts in no evidence, and takes the point that the trustee has not established a prima facie case which requires an answer from the creditors.

The fact that the debtor took up the post-dated cheque by a cash payment the day before the cheque became due is not relied upon by the trustee as evidence of an intention to make a fraudulent preference, because the account was overdue when the payment was made, and no valid agreement was made by the creditors to accept the post-dated cheque. But it appears that on July 20 the debtor sent out in all 108 cheques to his creditors, one of which was that which reached the present appellants. All were post-dated to July 31. The trustee affirms that the payment in cash on July 30 to the appellants unexplained, although the money was due and might have been paid in ordinary course of business, discharges the onus that lies upon him.

It is important to state what the trustee has to establish in order to prove that a payment has been made as a fraudulent preference. At common law there was nothing to prevent the debtor from preferring one creditor to another, and the Statute of Elizabeth (13 Eliz. c. 5) leaves the common law unchanged.

The principle now known as fraudulent preference was first formulated in a statute in s. 92 of the Bankruptcy Act, 1869. This section, but slightly altered, was reproduced by

s. 48 of the Act of 1883, and its successor forms s. 44 of the present Act.

We have to construe this section and apply it to the facts of the present case. I agree respectfully and fully with the observations of the members of the Court of Appeal in *Ex parte Griffith.* (1) Jessel M.R., Lindley and Bowen L.JJ. all affirm that in determining whether a transaction is a fraudulent preference of one creditor over the others, the Court now ought to have regard simply to the statutory definition contained in the current section. Lindley L.J. says (2): "What we have to consider is the true construction of s. 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the Legislature has laid down is equivalent to the standard of the old law. It may be so, but the language is different, and our duty is to construe that language:" see also per Baggallay L.J. in *Ex parte Hill.* (3)

The conditions which s. 44 requires are plain. First, that the payment is made by a person unable to pay his debts as they become due from his own money. Secondly, that it in fact prefers one creditor over others. Thirdly, that the dominant motive with which the payment was made was a desire to prefer that creditor to whom the payment was made. I have separated conditions 2 and 3 purposely, for clearness, for I think it has been decided many times that the mere fact that the payment does in fact prefer one creditor over others does not make it void as against the trustee in bankruptcy. As Mellish L.J. said in *Ex parte Topham* (4), quoting from the judgment of Bacon V.-C., then chief judge in bankruptcy, in *Ex parte Blackburn* (5): "But then [s. 92 of the Act of 1869] adds another qualification or condition, which is the very life and essence of the enactment, the payment so made must, in order to be void, be made 'in favour of any creditor with a view of giving such creditor a preference over the other creditors.' So that

(1) 23 Ch. D. 69.
(2) Ibid. 73.
(3) 23 Ch. D. 695, 700.
(4) L. R. 8 Ch. 614, 619.
(5) (1871) L. R. 12 Eq. 358, 364.

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unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor."

Lord Esher's judgment in *New, Prance & Garrard's Trustee* v. *Hunting* (1) is to the same effect. He adds that it does not matter much whether the word used is "intention" or "view" or "object." The question is whether in fact he had the intention to prefer certain creditors. He adds: "It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend." When that case was before the House of Lords (2) it appears to me that the House sustained the view expressed by Lord Esher, for Lord Halsbury quotes (3) the passage that I have extracted, in his speech, textually.

In that case, in his argument before the House, the Solicitor-General had argued that if the debtor acted with mixed views and part of the view or intention was to put one creditor in a better position than another, there is a fraudulent preference. Lord Halsbury rejects that argument as imputing absurdity to the Legislature. He says (4): "Nothing could have been easier than to have enacted, if they had thought proper to do so, that any preference to one creditor over another creditor, or any greater advantage . . . . given by previous payment to one creditor, to which advantage all the other creditors were not a party, should of itself be a preference which should be void under the statute." But he adds that no such intention is to be gathered from the statute. In my judgment, therefore, the dictum of Vaughan Williams L.J. in *In re Eaton & Co.* (5) is not correct. It was not in accord with the opinion of Cotton L.J. in *Ex parte Lancaster.* (6)

(1) [1897] 2 Q. B. 19, 27.
(2) Sub nom. *Sharp* v. *Jackson* [1899] A. C. 419.
(3) Ibid. 421, 422.
(4) Sub nom. *Sharp* v. *Jackson* [1899] A. C. 423.
(5) [1897] 2 Q. B. 16, 17.
(6) (1883) 25 Ch. D. 311, 318.

The latter's judgment has been preferred by Wright J. in *In re Laurie* (1) and by Younger J. in *Bulteel and Colmore* v. *Trustee in Bankruptcy of Parker and Bulteel.* (2)

In *Ex parte Lancaster* (3) Cotton L.J. had definitely stated that the onus lay on the trustee to give evidence that the view entertained by the debtor was to prefer the creditor. "Dominant or substantial," not necessarily the "sole," view is that which has since *Ex parte Hill* (3) been interpreted to be the proper meaning of the word: see per Bowen L.J. (4)

Evidence of kinship would prima facie discharge the onus upon the trustee, as in *In re Laurie* (1), and see *Ex parte Topham.* (5)

There are other facts which do likewise; and if the onus is discharged, no doubt the debtor must then displace the prima facie evidence of a dominant intention to prefer given by the trustee. This can be done by proving that the payment was made under pressure, or for one or other of the many reasons indicated by Phillimore J. in *In re Ramsay.* (6) But the trustee must discharge the onus that lies upon him. Has he done so here? No doubt all the attending circumstances should be taken into account. I have set out the facts as presented by the trustee. The fact that a number of cheques were sent out by the debtor on July 20 does not appear to be indicative of anything more than that the debtor expected to have means at his service with which to meet them when they fell due on July 31. No doubt there is the fact of the payment with its attendant result of preference on July 30, but there is no more.

We are not at liberty, for the reasons which I have attempted to explain, and in accordance with the authorities, to accept that fact as sufficient. I cannot speculate or surmise in order to supply the deficiency. Without evidence, the matter must be left where it is, unexplained, and without any character given to, or purpose proved in relation to, the mere payment. The learned judge, whose experience in

(1) 5 Manson, 48; 67 L. J. (Q. B.) 431.
(2) (1916) 32 Times L. R. 661.
(3) 23 Ch. D. 695.
(4) Ibid. 704, 705.
(5) L. R. 8 Ch. 614, 620.
(6) [1913] 2 K. B. 80, 85.

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bankruptcy is not to be overlooked, felt the difficulty, for he allowed counsel for the trustee to go into sources which we have held inadmissible. When that source is set aside, I cannot find any evidence given by the trustee sufficient to discharge the onus which lies upon him, and in my judgment the appeal ought to be allowed.

WARRINGTON L.J. On July 30, 1923, when the debtor was admittedly unable to pay his debts as they became due from his own money he paid to the appellant creditors the amount of their debt in cash. The trustee alleges and Lawrence J. has held that this payment was made with a view to giving the appellants a preference over the other creditors and was therefore to be deemed fraudulent and void as against the trustee: Bankruptcy Act, 1914, s. 44. The creditors appeal.

The question is purely one of fact, the answer to which in the present case, at all events—there being no statement by the debtor himself as to his view at the time—must depend on the inference the tribunal draws from the facts proved or admitted, being of course first duly instructed as to the law.

The law is stated by Lord Esher M.R. in *New, Prance & Garrard's Trustee* v. *Hunting* (1) in a passage cited with approval by Lord Halsbury in the same case in the House of Lords: sub. nom *Sharp* v. *Jackson*. (2) The learned Master of the Rolls says (3): "The doctrine with regard to fraudulent preference is well known. The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. It must be shown, not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention,' or 'view,' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the

(1) [1897] 2 Q. B. 19. (2) [1899] A. C. 419.
(3) [1897] 2 Q. B. 19, 27.

natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend." A. L. Smith L.J. says (1): "I have always understood that, to ascertain whether there has been a fraudulent preference, it is necessary to consider what the dominant or real motive of the person making the preference was; whether it was to defraud some creditors by preferring others, or for some other motive." I think these passages in themselves establish that it is for the trustee to make out some case that the payment was with a view to preferring the creditor, and that the mere fact that the payment results in a preference is not enough; but if there is any doubt that this is so it is removed by the judgments of Cotton L.J. and Lindley L.J. in *Ex parte Lancaster.* (2) Cotton L.J. says (3): "I cannot think that the proper inference to be drawn from the evidence is that the debtor did what he did in order to give his father-in-law a preference over the other creditors. This being a matter which it is for the appellant (the trustee) to make out —not, of course, conclusively, but so as to satisfy us—in my opinion he has failed to discharge the onus." Lindley L.J. says (4): "It has to be proved that the debtor failed to defend the action"—the matter complained of in that case—"with a view to giving his father-in-law a preference."

We have already decided that the learned judge ought not to have read the statements contained in the affidavit filed on behalf of the appellants for the reasons we gave on that occasion, and we are of course under the same obligation. The facts proved on behalf of the trustee are these: On July 31, 1923, the bankrupt gave notice to his creditors that he had suspended or was about to suspend payment of his debts. On August 3, 1923, a petition in bankruptcy was presented, and on August 30 he was adjudicated bankrupt. The bankrupt carried on business as a general merchant and shipper in the City of London. In the bankrupt's ledger there is an account with the appellants in which is an entry under date July 10, 1923: "By goods 460*l.* 16*s.* 8*d.*" This means of course that on

(1) [1897] 2 Q. B. 19, 29.
(2) 25 Ch. D. 311.
(3) 25 Ch. D. 318.
(4) Ibid. 319.

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that day he owed for goods sold and delivered the sum of 460*l.* 16*s.* 8*d.* The goods were actually delivered before July 10, but the date of the invoice was at the bankrupt's request altered from that date to July 10. On July 20 the bankrupt sent to the appellants and to 107 other creditors cheques post-dated July 31 for the amount of their respective debts less the ordinary trade discount where the contract allowed it. The cheque sent to the appellants was for 449*l.* 6*s.* 3*d.*, the amount of the debt 460*l.* 16*s.* 8*d.* less 11*l.* 10*s.* 5*d.* discount.

On July 30 the bankrupt paid to the appellants in cash the 449*l.* 6*s.* 3*d.* and took up the cheque—the receipt was dated June 30, but I treat this as a mere slip and attach no sinister or suspicious character to it. What is the proper inference to be drawn from these facts? The payment was purely voluntary. No threat of proceedings had been held out by the appellants. No special consequences of an unpleasant nature, such as those the effect of which was considered in *Sharp* v. *Jackson* (1), from the non-payment of the debt were to be apprehended. It was not long overdue. The debtor had only ten days earlier taken the step of sending to the 108 creditors post-dated cheques all payable on the same day—July 31—thus putting them all on an equality. Then on July 30, at a time when he must have already determined to give the notice of suspension actually given on the next day, he selects the particular creditor and pays him in full with money which but for such payment would have been distributed amongst the creditors generally. The conclusion seems to me to be inevitable. The payment being purely voluntary and the circumstances attending it being what I have described, I must and do infer that, for some reason or another of which we are ignorant, or for no definite reason in fact and for no other motive, he selected the particular creditors for preferential treatment, and therefore made the payment with a view to preferring them. I can find no rule of law which prevents me from drawing what seems to me an obvious inference.

(1) [1899] A. C. 419.

The case is a peculiar one, and it must not be supposed that it will be any authority for questioning the validity of a payment of a debt made in the ordinary course of business by a man who knows he is at the time insolvent, but who may well make such payments in the hope of keeping his business on foot for a time and perhaps even of passing safely through the period of danger. Such payments have been held not to be fraudulent under the provisions of the section, and I desire to throw no doubt on the correctness of such decisions.

It is true there is here nothing of any special nature in the relations between the bankrupt and the particular creditors tending to make probable a desire to prefer them. But the absence of such a circumstance which, if it were present, would make the inference easier, does not prevent its being drawn if the other circumstances lead to it.

On the whole I think the trustee has made out a case which ought to satisfy us that the necessary condition has been fulfilled and that the payment in question was fraudulent and void.

In my opinion, the appeal should be dismissed with costs.

SARGANT L.J. In the course of this appeal Mr. Tindale Davis for the appellants, Messrs. W. R. Snow & Co., has succeeded in withdrawing the affidavit filed by them, and in leaving the question in issue to be decided solely on the evidence contained in the affidavit filed by the trustee. The relevant paragraphs of this affidavit are five only—namely, those numbered 3 and 12 to 15 inclusive—and we have to determine whether the uncontradicted and unexplained statements in those paragraphs disclose a sufficient case for holding that there has been that which is to be deemed a fraudulent preference within s. 44 of the Bankruptcy Act, 1914, that is a payment made with a view of preferring Messrs. Snow & Co. to his other creditors.

These paragraphs show that the debt to Messrs. Snow & Co. of 449*l.* 6*s.* 3*d.* was in respect of goods invoiced to the bankrupt on July 10, 1923, and that on July 20, 1923, the

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bankrupt sent to Messrs. Snow & Co. and to 107 other creditors, in settlement of their several accounts, cheques which were all post-dated to July 31, 1923. On that day, however, the bankrupt gave notice to his creditors that he had suspended or was about to suspend payment, and thereby committed the act of bankruptcy on which he was shortly afterwards adjudicated bankrupt. No single one of the 108 post-dated cheques appears to have been paid on presentation. But on the day preceding the act of bankruptcy—namely, on July 30, 1923—the bankrupt paid Messrs. Snow & Co. alone of these 108 creditors their debt of 449*l.* 6*s.* 3*d.*, and was thereupon given a receipt dated June 30, 1923, that is, a month before the actual payment. The facts so stated seem, in the absence of any explanation by Messrs. Snow & Co., to involve some element of suspicion as to their conduct as well as that of the bankrupt. But it is only fair to Messrs. Snow & Co. to state that no suggestion is made against them that they had any knowledge of the desperate state of the bankrupt's affairs, or that the advantage they gained was anything more than fortuitous.

The case obviously is one in which the bankrupt must be taken on the crucial date not only to have been unable to pay his debts in due course, but to have fully realized that this was the case, and that his failure was imminent. And further, in the absence of any evidence to the contrary, it must, in my judgment, be taken that the selection of Messrs. Snow & Co. as the creditors to be paid in full was quite voluntary. No evidence, or indeed suggestion, of threats or pressure on the part of these particular creditors, or of fear on the part of the bankrupt, has been put forward by Messrs. Snow & Co.; they have offered no explanation whatever of their selection for payment nor could the bankrupt have made the payment to them alone with any hope of being able to continue to trade. In these circumstances I should have thought that, no alternative hypothesis being admissible, the only conclusion that could reasonably be drawn would be, that the bankrupt intended to do that which he in fact did—namely, voluntarily to prefer Messrs. Snow & Co. out of those

assets which he must by that time have recognized as liable to become immediately divisible amongst all his creditors pro rata.

It has however been strenuously contended by Mr. Tindale Davis for Messrs. Snow & Co., that under s. 44, sub-s. 1, of the Act it is not enough to show that a debtor, in immediate prospect of bankruptcy, has made what is in fact a preference in favour of one of his creditors, even though his act was on the face of it voluntary, and no other view or intention on the part of the bankrupt is proved or even suggested. It is said that some further affirmative evidence must be produced by the trustee of an intention on the part of the debtor to prefer that particular creditor. And for this purpose reference is made to a passage from the judgment of Lord Esher in *New, Prance & Garrard's Trustee* v. *Hunting* (1), as quoted and approved by Lord Halsbury in the same case when under appeal to the House of Lords: *Sharp* v. *Jackson* (2), and particularly to the two or three sentences following—namely: "It must be shown, not only that he (the debtor) has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend."

The passage in question, and particularly the sentences I have quoted in full, are said to show that a purely voluntary payment to one creditor alone when in imminent prospect of bankruptcy is not even prima facie evidence of an intention or view to prefer within s. 44. But in my judgment, notwithstanding the rather unqualified terms of the particular sentences I have quoted, this is not the meaning or effect of the whole passage taken together. For the next sentence of Lord Esher's is "The recitals in the deed seem to me to show what was really his (the debtor's) object." And Lord Esher then

(1) [1897] 2 Q. B. 19, 27. (2) [1899] A. C. 419, 421, 422.

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proceeds to find that the facts in relation to the deed in question disproved the prima facie intention of preferring the particular creditor, and established that the real intention of the debtor was to benefit himself. In my judgment, the whole passage taken together means this—namely, that the knowledge on the part of the debtor that the creditor would in fact receive a preference was not conclusive of intention to prefer, but might be displaced by evidence that the debtor was really actuated by some other reason, such as pressure, threat of legal proceedings for breach of trust (*Ex parte Taylor* (1)), or even as in *Sharp* v. *Jackson* (2), a definite fear of such proceedings. And to the same effect is the much shorter passage quoted by Lord Halsbury (3) from the judgment of Chitty L.J. —namely: "I ask myself what was really the view which Prance had in making this conveyance. Was it to prefer these particular trust estates to other creditors? The answer to that question must, I think, be in the negative. It was to protect himself against the charges hanging over him."

That Lord Halsbury quoted and approved of these passages as bearing this sense is, in my judgment, plain from other parts of his speech. Thus he quotes (4) from a judgment of Lord Cairns in *Butcher* v. *Stead* (5) a passage ending with the following sentence—namely: "The Act appears to have left the question of pressure as it stood under the old law; and, indeed, the use of the word 'preference,' implying an act of free will, would, of itself, make it necessary to consider whether pressure had or had not been used." Further on again in his speech (6) Lord Halsbury quotes from a passage in the judgment of Lord Mansfield in *Thompson* v. *Freeman* (7): "A bankrupt when in contemplation of his bankruptcy cannot by his voluntary act favour any one creditor; but if, under fear of legal process, he gives a preference, it is evidence that he does not do it voluntarily." And then Lord Halsbury adds: "There is the principle stated—it is not a voluntary act; and, as Lord Cairns says,

(1) (1886) 18 Q. B. D. 295.
(2) [1899] A. C. 419.
(3) Ibid. 422.
(4) [1899] A. C. 423.
(5) (1875) L. R. 7 H. L. 839, 846.
(6) [1899] A. C. 419, 425.
(7) (1786) 1 T. R. 155, 157.

the word 'preference' here imports in it the voluntary act of a person who can do either the one thing or the other as he prefers."

Lord Macnaghten's speech in *Sharp* v. *Jackson* (1) seems to me precisely to the same effect. The word "preference," he says, involves and imports a free choice. The debtor in that case was not in a position to exercise a free choice. He was under an overwhelming sense of peril. The whole reasoning of this very concise judgment is precisely to the same effect as that of Lord Halsbury, and obviously implies this—namely, that had the actual preference in that case been unexplained by pressure, had there been nothing to show it was not voluntary, the result must have been that the preference was illegal and avoided by the statute.

In view of the authority of *Sharp* v. *Jackson* (2) it may seem unnecessary to quote other cases. But I should like to refer to one or two others as establishing a general current of authority that, when a preference in fact has been given in anticipation of bankruptcy, such preference in fact requires justification by the establishment of some other sufficient dominant intention. In *Ex parte Topham* (3) Mellish L.J. adopted a test derived from *Ex parte Blackburn* (4)—namely, whether the act done could be referred to some other reason or intention than that of giving the particular creditor a preference over the other creditors. In *Ex parte Hall* (5) the test applied was whether there was an arbitrary selection of the particular creditor. In *Buckley's Case* (6) it was held that a desire to fulfil a moral obligation towards a particular creditor was not sufficient to justify a preference in fact—a decision which seems to imply that the result must be the same a fortiori, if no reason at all is suggested for the actual preference. And amongst all the cases referred to in the text-books we have not been referred to one in which an actual preference in view of imminent bankruptcy has been supported, except by showing affirmatively that the actual

(1) [1899] A. C. 419, 427.
(2) [1899] A. C. 419.
(3) L. R. 8 Ch. 614, 619.
(4) L. R. 12 Eq. 358, 364.
(5) 19 Ch. D. 580.
(6) (1899) 2 Ch. 725.

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preference was caused by some other reason—such as pressure, threats, fear or the like, which the Court considered as constituting the dominant motive, and as showing an intention displacing the prima facie intention to be gathered from the mere fact of preference. No case has been cited to us nor do I think any case can be found where a debtor in imminent expectation of bankruptcy has given a preference in fact to a particular creditor, which is apparently voluntary and is wholly unexplained, and where that preference in fact has been held good. To hold otherwise in this case would, in my judgment, be inconsistent with the whole course of decision in bankruptcy in such cases and would revolutionise the settled law in this respect.

I need hardly point out that we are not dealing with a case such as *In re R. O. Clay & Sons* (1), where a debtor who knew himself to be insolvent made a payment to a creditor in the course of his business, and with the object of being able to carry his business on. The facts here are such as to show that the debtor when he made the payment to Messrs. Snow & Co. must have known that he was about to suspend payment on the following day; and further had had his post-dated cheque held by Messrs. Snow & Co., apparently without objection, for nine days out of the ten by which it was post-dated. A clearer case of knowledge of immediate impending bankruptcy and of a purely voluntary payment it would be difficult to imagine. The suggestion of Mr. Tindale Davis that the trustee should have obtained direct evidence from the bankrupt that he intended to prefer Messrs. Snow & Co. seems to me thoroughly unpractical and hardly worthy of serious consideration. I agree with Warrington L.J. that the appeal should be dismissed with the usual consequences.

Appeal dismissed.

Solicitors for appellants: *H. H. Wells & Sons.*
Solicitors for respondent: *Charles Nordon & Co.*

(1) (1895) 3 Manson, 31.

W. I. C.

ATTORNEY-GENERAL *v.* EALING CORPORATION.

ROMER J.

1924

April 7, 8, 14.

[1923. A. 2540.]

Electricity—Extension of existing "generating station"—Extension of Capacity but not of Size of Plant—Consent of Electricity Commissioners—Electricity (Supply) Act, 1919 (9 & 10 *Geo.* 5, *c.* 100), *ss.* 11, 36—*Expense of New Engine—Expense properly chargeable to Capital—Ealing Electric Lighting Order*, 1891, *s.* 52.

The substitution for existing plant of smaller but more efficient plant inside a generating station is an extension of that station as defined by s. 36 of the Electricity (Supply) Act, 1919, and requires the consent of the Electricity Commissioners under s. 11 of that Act.

The defendants' Electric Lighting Order provided for the application of revenue in payment of working and establishment expenses and interest or dividend on mortgage stock or other securities, in providing instalments or sinking fund in respect of borrowed moneys and a reserve fund, and in payment of "all other expenses of executing this Order not being expenses properly chargeable to capital":—

Held, that the cost of installing the new plant was an expense properly chargeable to capital, and that the defendants were not empowered or authorized to pay for the cost of the new plant out of unapplied income.

WITNESS ACTION.

In the year 1920 the defendants, who had succeeded to the undertaking authorized by the Ealing Electric Lighting Order, 1891, confirmed by the Electric Lighting Orders Confirmation (No. 2) Act, 1891, had, at their generating station, ten reciprocating engine generating sets of a combined capacity of 2520 kilowatts supplying alternating current. In December of that year the Electricity Supply Committee of the defendants came to the conclusion that it would not be possible to maintain the supply at the proper pressure during the winter period of 1922–23 unless additional generating plant were installed, and by a letter of December 20, 1920, the defendants so informed the secretary of the Electricity Commission. In reply, the Electricity Commissioners informed the defendants that in order to insure an adequate supply of electricity to the consumers in the defendants' area during the winter period of 1922–23 a bulk supply would be required, and stated that negotiations should be entered into with the Metropolitan Supply Company

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for that purpose. The defendants entered into negotiations with the Metropolitan Electric Supply Company as directed, but were unable to come to terms with that company. Thereupon they entered into a provisional agreement with the Hammersmith Corporation for a bulk supply, but failed to obtain the sanction of the Electricity Commissioners thereto. In this state of affairs the defendants determined to make certain alterations in their existing plant, and in the year 1923 they removed four of their generating sets having a combined capacity of 300 kilowatts, and substituted therefor a turbo alternator having a capacity of 2000 kilowatts. This was done at a cost of some 20,000*l*. This turbo alternator admittedly occupied somewhat less space in the generating station than was occupied by the four sets which it replaced. The alteration had the effect of increasing the capacity of the generating station, so far as alternating current was concerned, by 1700 kilowatts. This alteration was admittedly effected without obtaining the previous consent thereto of the Electricity Commissioners in compliance with the provisions of s. 11 of the Electricity (Supply) Act, 1919. (1)

In the months of June and July, 1921, the Commissioners, to the knowledge of the defendants, had held a local inquiry as provided by the said Act, and as a result of the evidence given thereat had formed the opinion that the generating station of the defendants should not be extended, but should be shut down as soon as circumstances would permit.

The defendants had paid the 20,000*l*., the cost of the

(1) The Electricity (Supply) Act, 1919, provides as follows :—

Sect. 11: "Notwithstanding anything in any special Act or order in force at the passing of this Act, it shall not be lawful for any authority, company, or person to establish a new or extend an existing generating station or main transmission line without the consent of the Electricity Commissioners (which consent shall not be refused or made subject to compliance with conditions to which the authority, company, or person object, unless a local inquiry has been held), but this restriction shall not apply to the establishment or extension of a private generating station . . . ."

Sect. 36: "In this Act, unless the context otherwise requires: The expression 'generating station' means any station for generating electricity, including any buildings and plant used for the purpose, and the site thereof, and a site intended to be used for a generating station, but does not include any station for transforming, converting, or distributing electricity."

alteration, out of the profits of their electricity undertaking. The plaintiff alleged that this application of profits was not authorized by s. 52 of the Ealing Electric Lighting Order, 1891, as confirmed by the Electric Lighting Orders Confirmation (No. 2) Act, 1891. (1)

(1) Sect. 52 of the Ealing Electric Lighting Order, 1891, provides as follows :—

"All moneys received by the Undertakers in respect of the undertaking except (*a*) borrowed money, (*b*) money arising from the disposal of lands acquired for the purposes of this order, and (*c*) money not of the nature of rent received by them in respect of any transfer under the provisions of this order shall be applied by them as follows :—

"(1.) In payment of the working and establishment expenses and cost of maintenance of the undertaking, including all costs expenses penalties and damages incurred or payable by the Undertakers consequent upon any proceedings by or against the Undertakers their officers or servants in relation to the undertaking.

"(2.) In payment of the interest or dividend on any mortgages stock or other securities granted and issued by the Undertakers in respect of money borrowed for electricity purposes.

"(3.) In providing any instalments or sinking fund required to be provided in respect of moneys borrowed for electricity purposes.

"(4.) In payment of all other their expenses of executing this order not being expenses properly chargeable to capital.

"(5.) In providing a reserve fund if they think fit by setting aside such money as they may from time to time think reasonable and investing the same and the resulting income thereof in Government securities or in any other securities in which trustees are by law for the time being authorised to invest other than stock or securities of the Undertakers and accumulating the same at compound interest until the fund so formed amounts to one-tenth of the aggregate capital expenditure on the undertaking which fund shall be applicable to answer any deficiency at any time happening in the income of the Undertakers from the undertaking or to meet any extraordinary claim or demand at any time arising against the Undertakers in respect of the undertaking and so that if that fund is at any time reduced it may thereafter be again restored to the prescribed limit and so from time to time as often as such reduction happens.

"The Undertakers shall carry the net surplus remaining in any year and the annual proceeds of the reserve fund when amounting to the prescribed limit to the credit of the local rate as defined by the principal Act or at their option shall apply such surplus or some part thereof to the improvement of the district for which they are the local authority or in reduction of the capital moneys borrowed for electricity purposes.

"Provided always that if the surplus in any year exceed five pounds per centum per annum upon the aggregate capital expenditure on the undertaking the Undertakers shall make such a rateable reduction in the charge for the supply of energy as in their judgment will reduce the surplus to the said maximum rate of profit but this proviso shall only apply to so much of the undertaking as shall for the time being remain in the hands of the Undertakers. . . ."

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The plaintiff commenced this action on behalf of the Crown for (1.) a declaration that the defendants were not entitled to extend their generating station by the installation of the plant above mentioned or of any plant of greater capacity than plant of 300 kilowatts capacity without the consent of the Electricity Commissioners first having been obtained; (2.) a declaration that the payment for the new turbine generating plant out of accumulated profits was ultra vires; (3.) consequential injunctions; and (4.) a mandatory order to restore their generating station to its previous condition.

Sir Patrick Hastings A.-G., *Farwell K.C.* and *Dighton Pollock* for the plaintiff. An extension of the generating station contemplated by s. 11 includes an extension of generating plant. The term "generating station" is not confined to the building, but includes the plant and site, and if part is extended the whole is extended. What the defendants have done is to remove the old plant and introduce new plant of a greater capacity. Sect. 13 of the Electric (Supply) Act, 1922, does not in any way remove the necessity of applying for the consent of the Commissioners to an extension of a generating station under s. 11 of the principal Act.

The expenditure of 20,000*l.* does not fairly come within any of the objects of expenditure authorized by s. 52 of the Order, and cannot be justified. It is an expense which in the interest of the consumers is properly chargeable to capital.

Hughes K.C. and *S. G. Turner* for the defendants. There has been no extension of the plant, for the new plant, although more efficient, occupies less space than the old; and upon the construction of s. 11 we submit that there is no prohibition against the extension of plant inside the generating station. Even if the plant has been extended, the extension of plant inside a generating station does not enlarge or extend the latter any more than the building of a house in the centre of a town enlarges the town. The plant itself has in fact been reduced. Reduction in size with increased efficiency

cannot, we submit, be an extension. The Act can never have been intended to prevent the replacement of old plant, and that is all that has been done. The old plant has been scrapped and cannot be restored.

Sect. 52, sub-clause 4, of the Order authorizes the undertakers to apply revenue in payment of all other their expenses of executing the Order not being expenses properly chargeable to capital. That leaves it to the undertakers to decide what ought to be charged to capital and what to revenue. The defendants in the bona fide exercise of their discretion have decided that the cost of this new plant should come out of unapplied revenue, which, we submit, they were empowered and entitled to do.

Sir Patrick Hastings A.-G. in reply.

Cur. adv. vult.

April 14. ROMER J. The first question to be determined is whether the defendants, the mayor, aldermen and burgesses of the borough of Ealing have "extended" their generating station within the meaning of s. 11 of the Electricity (Supply) Act, 1919. That section provides that it shall not be lawful for any authority, company, or person, to establish a new, or extend an existing, generating station, or main transmission line without the consent of the Electricity Commissioners.

The facts giving rise to this question can be shortly stated. [His Lordship stated the facts above set out and continued:] It is contended on behalf of the Attorney-General that this introduction of the turbo alternator was an extension of the defendants' then existing generating station, having regard to the definition of the phrase "generating station" contained in the Electricity (Supply) Act, 1919. It is, however, contended on behalf of the defendants that the Act does not prohibit an extension of the plant inside the generating station, but only an extension of the generating station itself; alternatively, they contend that they have not extended their plant. Now, the expression "generating station" is defined by s. 36 of this Act as follows: "The expression 'generating station' means any station for

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generating electricity, including any buildings and plant used for the purpose, and the site thereof, and a site intended to be used for a generating station, but does not include any station for transforming, converting, or distributing electricity." In this definition, the words "including any buildings and plant used for the purpose, and the site thereof" must refer to the word "station" where last used. The expression "generating station," therefore, where used in the Act means any buildings and plant used for the purpose of generating electricity as well as the site of such buildings. It would seem to follow that s. 11 makes it unlawful to extend any existing plant that is used for the purpose of generating electricity. The defendants' first contention really amounts to this, that the expression "generating station" means any buildings used for the purpose of generating electricity, and the site thereof. This is not, in my opinion, the effect of the definition clause. If it were, there could have been no object in referring to the plant at all. I am of opinion that if the defendants have "extended" their plant they have committed a breach of the provisions of s. 11 of the Act.

I turn, therefore, to the question whether the defendants have extended their plant. That depends upon whether s. 11 of the Act merely prohibits an extension in size, or whether it also prohibits an extension in capacity. In my opinion, it prohibits both. The main object of the Act was to secure, in the public interest, efficiency and economy in the supply of electricity. For this purpose the Act provides means for the establishment, by Orders of the Electricity Commissioners, of separate electricity districts, and of schemes for the improvement of the existing organization for the supply of electricity in such districts. In determining the areas to be included in the several electricity districts, and in settling the schemes for the improvement of the existing organization, an important consideration must obviously be the capacity of the existing generating stations owned by the various authorized undertakers in the several areas. The size of the site or buildings or plant

of the stations would be of relative unimportance. Now the object of s. 11 of the Act would seem to be to insure that the Electricity Commissioners, in determining the constitution of the districts, and in settling the improvement scheme, are not embarrassed or hindered by the establishment of new, or the extension of existing, generating stations without their consent. This object would be largely frustrated if any authorized undertaker could, without the consent of the Commissioners, materially increase the capacity of his generating station. It is not, perhaps, the most appropriate way of describing such an increase to call it an extension of the plant. But a person who extends the capacity of his plant may not inaccurately be said to extend his plant, and, in my opinion, the prohibition of s. 11 of the Act against extending the plant used for generating electricity covers an extension of the plant's capacity. I must therefore make a declaration as asked by the first paragraph of the claiming portion of the statement of claim. The Attorney-General does not ask for any injunction, mandatory or otherwise, at the present time, but the Order must reserve liberty for him to apply for one in the future should it become necessary or desirable for him to do so.

The second question to be determined is whether the defendants are justified in paying the cost of the new turbo alternator out of the profits of their electricity undertaking. Now s. 52 of the Ealing Electric Lighting Order, 1891, provides as follows: [His Lordship read the section and continued:] The payment of the cost of the turbo alternator out of income cannot be justified unless such cost falls within the description in sub-clause 4 of expenses of executing the Order not being expenses properly chargeable to capital. As to this, I can only say that, in my opinion, the cost of providing an entirely new generating engine at a sum of 20,000*l.* is an expense properly chargeable to capital. It was urged on behalf of the defendants that no expense was properly chargeable to capital within the meaning of s. 52 if the defendants bona fide came to the conclusion that it

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might properly be paid out of income. I cannot accede to this view. The proviso to the section shows that the consumers of electricity in the defendants' area are greatly interested in seeing that the surplus income from the undertaking is as large as possible, and I think that the exception of "expenses properly chargeable to capital" is intended to be an exception of expenses that, as between persons interested in income and capital respectively ought, in fairness, to be paid out of capital. In my opinion, the 20,000*l.* is such an expense. I will therefore make a declaration as asked by para. 2 of the claim.

Solicitor for the plaintiff: *The Treasury Solicitor.*

Solicitors for the defendants: *Ruston, Clark & Ruston, for George E. Brydges, Ealing.*

R. M.

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In re MEREDITH.

DAVIES *v.* DAVIES.

[1923. M. 3765.]

Will—Bequests to Son—Son afterwards predeceasing Testator leaving Children—Codicil reciting Son's Death and consequential Lapse of Bequests—Erroneous Assumption—Legacies to Son's Children by Way of some Provision for them—No further Disposition of Property given to Son—"Contrary intention"—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 33—*Good Legacies to Son's Children.*

By his will the testator bequeathed a share of furniture and a legacy of 100*l.* to his only son, and his residuary estate in equal shares between his five children by name, including the son. The son died in the testator's lifetime leaving children who survived the testator. By a codicil to his will the testator provided as follows: "Whereas since the date of my said will my son has died and the legacy and share of residue given to him by my said will have lapsed Now with a view of making some provision for the two children of my said son I give to each of them a legacy of 100*l.*," and in all other respects he confirmed his will:—

Held, (1.) that inasmuch as the testator believed that the death of his son had caused the gifts of the legacy and share of residue to lapse, his failure to make further disposition of the legacy and share of residue showed an intention to let them lapse, and that thereby "a contrary

intention" appeared within the meaning of s. 33 of the Wills Act, 1837, (1) so as to prevent the application of that section.

(2.) That the legacy and share of residue given to his son were undisposed of; that the gift of furniture took effect by virtue of s. 33; and that the legacies to the son's children were payable.

Quaere, whether if the testator's codicil had merely stated the fact of his son's death and then given a legacy to each of the son's children, "a contrary intention" would have thereby appeared within the meaning of s. 33.

The suggestion in note (*i.*) on p. 448 of Jarman on Wills, 6th ed., vol. i., that the illustration there given would show "a contrary intention," disapproved.

ADJOURNED SUMMONS.

By his will dated September 26, 1916, the testator appointed the plaintiffs his executors and trustees, and gave to his wife the defendant Ann Meredith for her use during her life the whole of his household furniture, and after her decease, gave the same equally between "my five children James Meredith Eliza Ann Davies Edith Meredith Nellie Lewis and Lucy Lloyd." The testator then gave to his son the said James Meredith a legacy of 100*l.*, and proceeded as follows: "I give the residue of my real and personal estate to my trustees upon trust to receive the rents issues and profits of the same and thereout to pay an annuity of 31*l.* 4*s.* to my said wife during her lifetime and to divide what remains thereafter between my said five children in equal shares And I direct that on the death of my said wife the said annuity shall fall into and form part of my residuary estate."

James Meredith, the testator's son, died intestate in February, 1917, leaving his widow and two infant children, all of whom were defendants, surviving him.

By a codicil dated August 1, 1917, the testator provided as follows: "Whereas since the date of my said will my son James Meredith has died and the legacy and share of

(1) Wills Act, 1837, s. 33: "That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

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residue given to him by my said will have lapsed Now with a view of making some provision for the two children namely Thomas James Meredith and Violet May Meredith of my said son James Meredith I give to each of them a legacy of 100*l.* free of duty such sums to be invested by my trustees and handed over to the said children with all interests on their respectively attaining the age of twenty-one years." Then after a gift to his wife the testator in all other respects confirmed his said will.

The testator died in August, 1920.

This was a summons by the executors for the determination of the question whether " a contrary intention " appeared in the codicil so as to negative the application of s. 33 of the Wills Act, 1837, to the gift of a legacy of 100*l.* and share of residue to the testator's son James Meredith, and also whether the legacies of 100*l.* each to James Meredith's children given by the codicil in trust for them were payable in the circumstances.

Roger Turnbull for the plaintiffs.

J. F. Carr for the testator's widow and daughters. If s. 33 applies, the gifts to the son in the will did not lapse. The codicil was made without regard to s. 33 and is inconsistent with the effect of that section, and shows " a contrary intention " within the meaning of the section, which, therefore, does not apply. The testator states what he understood to be the legal effect of his son's death, and he would not have made the gift to the son's children if he had understood the effect of the application of s. 33. It is not merely a mistake of fact, but a question whether there was a contrary intention. Any expression of a contrary intention is sufficient to prevent the operation of s. 33 : Jarman on Wills, 6th ed., vol. i., p. 448, n. (*i.*), even though, I submit, founded upon a misapprehension of the law, and the testator has imported into his testamentary dispositions, as contained in the codicil, an intention that s. 33 should not apply. The belief that the gift had lapsed was equivalent to an intention that it should lapse.

If however s. 33 is not excluded, then I submit that the recital and the gift contained in the codicil amount to a revocation of the gift to the son in the will, but if not, then that the gifts to the son's children cannot stand, as they are conditional upon the gifts to the son having failed.

Swords for the son's widow and children. The codicil shows that the testator had never heard of s. 33, and it is not possible to impute to him an intention to exclude something of which he had never heard. To have a contrary intention a man must know the facts upon which that intention is based. If the testator had said "Whereas the share has lapsed, now I revoke the gift," that mistake would not have worked a revocation: Williams on Executors, 11th ed., vol. i., pp. 108, 123; *Campbell* v. *French* (1); and if so, the Court will not imply a contrary intention from the mistake made by this testator. The mere fact that he has left legacies to his son's children does not in itself amount to a contrary intention, and much less ought the Court to deprive the son's estate of the legacy and share of residue left to him. The question of revocation under mistake was discussed in *In re Churchill* (2), but in the present case there was no revocation, and I submit that s. 33 applies and that the gift of legacies to the son's children also operates, for they are given not out of the son's share but generally.

Carr in reply referred to *In re Morris.* (3)

ROMER J. In this case I have to determine whether the testator has expressed "a contrary intention" within the meaning of s. 33 of the Wills Act. [His Lordship read the section and also the will of the testator and continued:] So that what he has given by his will to his son James Meredith was a share of his household furniture after his wife's death, a legacy of 100*l.*, and a one-fifth share of his residuary estate subject to his wife's annuity. In point of fact James Meredith died in the lifetime of the testator leaving issue who survived the testator. Therefore, if the testator had died without making any other testamentary disposition,

(1) (1797) 3 Ves. 321. (2) [1917] 1 Ch. 206.
(3) (1916) 115 L. T. 915.

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s. 33 would have applied and the share of furniture, the legacy of 100*l.* and the share of residue would have devolved as if James Meredith had died after the testator and would have formed part of his estate, because the testator had not by his will shown any contrary intention. But on August 1, 1917, shortly after the death of James Meredith, the testator made a codicil in these terms. [His Lordship read the codicil and continued :] Mr. Swords has contended that the testator has shown by the recital in the codicil that he had never heard of s. 33 of the Wills Act, and that having obviously never heard of that section it is not possible to say that the codicil shows any intention that that section shall not operate. I think, however, that the fallacy in that argument lies in this, that s. 33 does not say that the section shall apply unless the will says in terms that it shall not apply, but that in the event specified in the section the devise or bequest shall operate in a particular way unless the testator by his will indicates an intention to the contrary. There may therefore be a "contrary intention expressed by the will," even though the testator had never heard of the provisions of the section. What I have to consider is whether the testator has shown an intention that notwithstanding that James Meredith was dead leaving issue who might survive the testator, the share and legacy should nevertheless lapse.

Now approaching this codicil to see whether it shows such an intention, it appears to me that it does. For although the testator recites that the legacy and share had lapsed, no lapse at that moment had taken place because the testator was still living and he could still make such testamentary disposition as he thought fit to meet the case that had arisen. When therefore he recites that the legacy and share had lapsed what he means is : "Whereas since the date of my will my son James Meredith has died, and having regard to the dispositions made by my will the legacy and share of residue given to him by my will will lapse if I do not make some other disposition of them." Now he could, had he so wished, have provided that notwithstanding the death of James Meredith in his lifetime the legacy and share of residue should be paid to James Meredith's executors as part of James

Meredith's estate, or he could have given the legacy and share direct to the children of James Meredith, or he could have said that "as James Meredith has died I will not make any provision as to his legacy and share of residue, but I will let them lapse." It seems that by not disposing of the share and legacy and by bequeathing the 200*l.* to his children he has in effect said: "I do not desire that the said legacy and share shall be paid to my son's executors as part of his estate, but that subject to paying his children 100*l.* each the legacy and share of residue shall lapse." For these reasons I come to the conclusion that the codicil shows a contrary intention within the meaning of s. 33.

There does not appear to be any direct authority on the point. I was, however, referred to *In re Morris.* (1) In that case the testatrix after a gift to certain of her children by name had expressly provided that in case any child should die in her lifetime leaving issue surviving her the bequests thereinbefore contained to her children should take effect in the same manner as if the child so dying had survived her and died immediately after her—so far providing quite unnecessarily for what would have been effected by s. 33 of the Wills Act—but the testatrix went on to say "but so that the share or shares of my said estate bequeathed to him or her or which he or she would have taken if surviving me shall devolve to his or her next of kin or legatees as part of his or her estate." Accordingly the learned judge had to consider whether he could give effect to that last declaration, which was of course different from the provisions of s. 33, and he came to the conclusion that he was obliged to give effect to it. If and so far as he came to the conclusion that that declaration indicated a contrary intention within the meaning of s. 33, it is perhaps an authority in favour of the view I have taken, but I think that the learned judge was merely determining which of two inconsistent clauses in the will should take effect. I was also referred to a note to p. 448 of vol. i. of Jarman on Wills, 6th ed., which is as follows: "It is submitted that any expression of a contrary intention is sufficient to prevent the operation of s. 33." So far I

(1) 115 L. T. 915.

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agree. But the note goes on: "Thus if a testator bequeathed 1000*l.* to his son A., and proceeded 'but if my said son shall die in my lifetime, then I bequeath the sum of 200*l.* to each of his children,' would not this be sufficient to exclude the operation of s. 33, whatever the number of the son's children might be?" With all respect I cannot agree with that. If I had nothing in this codicil but a statement of James Meredith's death and then the gift of a legacy of 100*l.* to each of his children, I should not be prepared to hold that the codicil showed a contrary intention within the meaning of the section. For, if the section operated, the children of the deceased son would not take directly any part of the legacy or share of residue bequeathed to him and would not even be benefited by the bequest except in so far as they might be interested in his personal estate under his will or his intestacy. I could not therefore regard a direct gift to the children as an indication of the testator's intention that he did not wish the legacy or share of residue to form part of the deceased son's estate. In the present case I rely on the fact that the testator after expressly reciting in his codicil that owing to the death of his son, the legacy and share of residue given to him by the will have lapsed, makes no express disposition to prevent such lapse taking effect. This, in my opinion, amounts to an expression of his intention that the legacy and share of residue given to the son by the will shall lapse. There is no mention of the furniture in the codicil, and therefore the gift of that in the will takes effect by virtue of the section, but the legacy of 100*l.* and the share of residue lapse, and as to them there is an intestacy. The legacies to the son's children will take effect as directed in the codicil.

Solicitors for plaintiff's and testator's family: *Churchill, Clapham & Co., for H. Oliver, Llandrindod Wells.*

Solicitors for son's family: *T. D. Jones & Co., for E. P. & A. L. Careless, Llandrindod Wells.*

R. M.

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London County Council v. *Att.-Gen.* [1902] A. C. 165 and *Att.-Gen.* v. *Mersey Ry. Co.* [1907] A. C. 415 distinguished.

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